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October 27, 2004

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
The Portal, 445 12th Street, S. W.
Room TW-A325
Washington, D. C. 20554

Re: *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211

Dear Ms. Dortch:

Because of the similarity of the issues presented in the two proceedings, BellSouth submits the attached pleadings, previously filed in the *IP-Enabled Services* proceeding, and requests that they be included in the record of the proceeding identified above.

Respectfully submitted,

Richard M. Sbaratta

Attachment

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
Petition of SBC Communications Inc	)	WC Docket No. 04-29
For Forbearance from the Application of	)	
Title II Common Carrier Regulation to	)	
IP Platform Services	)	

COMMENTS

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May 28, 2004

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COMMENTS

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), pursuant to the *Notice of Proposed Rulemaking ("NPRM")*[1] urges the Commission to establish a deregulatory and market-based national policy that treats all providers of equivalent IP-enabled services the same.

I. INTRODUCTION AND SUMMARY: DISPARATE REGULATION OF IP-ENABLED INFORMATION SERVICES AND IP-ENABLED TELECOMMUNICATIONS SERVICES MUST END

The *NPRM* states two critical truths: "the nature of IP-enabled services may well render the rationales animating the regulatory regime that now governs communications services inapplicable" and that "the disparate regulatory treatment assigned to providers of 'telecommunications services' and 'information services' might well be inappropriate in the context of IP-enabled services."[2] The Commission then asks how it "might alter the regulatory treatment that might otherwise accompany the statutory classification . . . for various classes of

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1 *Pleading Cycle Established for Comments in IP-Enabled Services Rulemaking Proceeding*, WC Docket No. 04-36, *Public Notice*, DA-04-888 (rel. Mar. 29, 2004).

2 *IP-Enabled Services*, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, FCC 04-28, ¶ 45 (rel. Mar. 10, 2004) ("*NPRM*").

IP-enabled services."[3] The answer is that the Commission should, among other things, use its ancillary Title I authority and its forbearance authority under Title II to craft an even-handed regime and avoid the disparate treatment of competing technologies that a might otherwise accompany the legacy "classification" of an IP-enabled service.[4]

The Commission has long established that the provision of information services, with the crucial exception of those offered by a Bell operating company ("BOC"),[5] should be unencumbered by economic regulation at any level.[6] By contrast, telecommunications service providers are subject to extensive legacy economic regulation and obligations at both the federal level under Title II and at the state level.[7] IP-enabled services are now, and may in the future continue to be, deployed either as information services or as private or public telecommunications services, or perhaps as a combination of both.[8] They may be provided by unregulated facilities-based or non-facilities-based information services providers; by local exchange carriers, including BOCs, and interexchange carriers regulated under Title II; by wireless carriers normally subject to Title III and by cable operators ordinarily regulated under Title VI. In order to create a level playing field for all these carriers, the Commission should use the "host of statutory tools" provided by Congress to structure a unified " approach to IP-enabled

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3 *Id.*

4 The Commission may alter regulatory treatment. It has no power, of course, to alter the statute.

5 *NPRM* at n.217.

6 *Id.* ¶¶ 25, 27.

7 *Id.* ¶ 26; 47 U.S.C. § 152(b)(1) (excepting intrastate wire and radio communications from Commission jurisdiction).

8 *NPRM* ¶ 43.

services"[9] regardless of who provides them and whether they are provided as information services or telecommunications services.

Such an even-handed approach to IP-enabled services must build on the policy insights articulated by the Commission in its *NPRM* while at the same time implementing the statute's public policy objectives with respect to domestic interstate wireline and wireless communications.[10] Chief among the Commission's correct insights is its recognition of the public interest value of the "virtuous circle" in the context of IP-enabled services, the role of rapid broadband deployment within the virtuous circle, and an understanding of the relevance of market conditions for IP-enabled services to traditional economic regulation of IP-enabled services. As use of Internet Protocol ("IP") expands, the Commission explains, "the technology's transformative effect on the communications landscape will likely become only more prominent, giving rise to a 'virtuous circle' in which competition begets innovation, which in turn begets more competition."[11] The technology's current transformative prominence is due in large part to the widespread deployment of broadband technologies, because "[a]s broadband facilities have proliferated, communications services and networks have increasingly taken advantage of the efficiencies associated with translating data into IP packets running over the same network infrastructures."[12]

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9 *Id.* ¶ 46.

10 As the Commission notes, Congress has stated that the Internet should remain free from regulation, that universal service should be maintained, that telecommunications equipment and service should remain usable by people with disabilities, that prompt emergency service should be available to the public through the 911 system, and that communications should be accessible to law enforcement officers acting on the basis of a warrant. *Id.* ¶ 42.

11 *Id.* ¶ 22.

12 *Id.* ¶ 3.

Increased broadband deployment has in turn "prompted the development of services and applications that provide broader functionality and greater consumer choice at prices competitive to those of analogous services provided over the public switched telephone network (PSTN)."[13] Thus, the virtuous circle is created, and the economic wheel set spinning:

> The development of [new capabilities and service offerings] is likely to prompt increased deployment of wireline, cable, wireless and other broadband facilities capable of bringing IP-enabled services to the public, which in turn, we expect, will prompt further development and deployment of such services.[14]

IP-enabled services generally, explains the Commission, and voice over IP in particular, "will encourage consumers to demand more broadband connections, which will [in turn] foster the development of more IP-enabled services."[15] Neither IP-enabled services, whether provisioned as information services or telecommunications services, nor the broadband platform services that are essential to fostering the further development and deployment of IP-enabled services, will flourish in an environment of economic regulation.

The Commission requests comment on whether, to the extent the market for IP-enabled services is not characterized by the monopoly conditions that originally underlay much of the telecommunications regulation implemented by the Commission, there is a compelling rationale for applying traditional economic regulation to providers of IP-enabled services.[16] There is none. As the Commission notes in the *NPRM*, the IP-enabled services market is characterized by proliferating applications, increased demand for Internet access, and augmented network

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13 *Id.*

14 *Id.*

15 *Id.* ¶ 5.

16 *Id.*

capacity deployed across multiple broadband services platforms, including those of LECs, cable operators, direct broadcast satellite providers ("DBS"), video programming providers, wireless (including WiFi and CMRS) providers, and electric companies using power lines.[17] Subjecting any or all of these providers, new entrant and incumbent alike, to economic regulation in light of a decade of open market conditions for IP-enabled services,[18] and the fiercely competitive broadband access market, is the surest way to corrupt the virtuous circle with regulatory distortions that will retard, rather than foster, the domestic economy.

On the other hand, the Commission can and should take appropriate action to ensure that Congress's public interest objectives, including the availability of prompt emergency service to the public through the 911 system, access to communications by law enforcement officers acting under warrant, and maintenance of universal service, be maintained. In these comments, BellSouth demonstrates why the Commission must use its existing statutory tools to fashion an appropriate approach to IP-enabled services within its existing "vertical" regulatory framework, without carrying forward harmful legacy economic regulation or abdicating oversight over important public interest matters, regardless of the service's regulatory classification.

In Part II, BellSouth offers a definition of "IP-enabled" broad enough to maximize customer customization opportunities but workably limited to communications that originate from or terminate to the customer in the IP format across an IP platform. In Part III BellSouth describes an approach to IP-enabled services predicated on exclusive Commission jurisdiction

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17 *Id.* ¶ 9, n.33.

18 *Id.* at n. 13 ("Indeed, while a century of PSTN development [subject to economic regulation] has given rise to relatively few opportunities for user customization, a mere decade of widespread commercial use has produced a dizzying array of IP-enabled services, ranging from presence management to multimedia conferencing to unified messaging . . . .").

over both IP-enabled information and telecommunications services, on the current competitive state of the IP-enabled services market, and on implementing important public interest goals as articulated by Congress in the Act. Finally, using specific examples of BellSouth-provided IP-enabled information service and IP-enabled telecommunications service arrangements, BellSouth explains in Part IV how, under the Commission's existing regulatory classifications, each of these arrangements should be treated (whether provided by BellSouth or any other service provider) in order to ensure that all providers of IP-enabled services are treated the same.

II. A COMMUNICATIONS SERVICE IS IP-ENABLED WHEN SOME PART OF IT IS ORIGINATED OR TERMINATED BY THE CUSTOMER IN THE INTERNET PROTOCOL

The Commission uses the term "IP-enabled services" to include services and applications relying on the Internet Protocol family.[19] The Commission goes on to state that IP-enabled "services" could include the digital communications capabilities of increasingly higher speeds, which use a number of transmission network technologies, and which generally have in common the use of the Internet Protocol, while IP-enabled "applications" could include capabilities based in higher-level software that can be invoked by the customer or on the customer's behalf to provide functions that make use of communications environment.[20]

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19 *NPRM* at n.1.

20 *Id.* What the Commission describes should not rule out forms of "advanced telecommunications capability" under section 706 of the Act which is defined "without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics and video telecommunications using any technology." 47 U.S.C. § 157, note (c)(1). Although "broadband" is not defined by statute, the Commission has used this term to mean sufficient capacity to transport large amounts of information, and has recognized that under its evolving nature the Commission "may consider today's 'broadband' services to be 'narrowband' services when tomorrow's technologies appear." *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 & 96-98, *Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98*, 14 FCC Rcd 20912, 20914, n.2. (1999).

A. IP-Enabled Services Should be Broadly Defined and Include Both Information Services and Telecommunications Services.

BellSouth agrees that the term "IP-enabled services" should include both "services" and "applications" that "rely on the Internet Protocol (IP) family." These services can include both "information services" and "telecommunications services." The term "IP-enabled" should be defined so as to include any voice, data, video or other form of communication service provided by any type of communications provider (including telephone companies, cable companies, wireless providers, satellite companies, power line companies, ISPs, or any other type of entity) whereby some part of such service is originated or terminated by the customer in the Internet protocol and transported over an IP platform. An IP platform consists of IP networks and their associated capabilities and functionalities that can be used to provide IP services and applications, or multiple IP services and other more advanced packet services and applications, and may include the use of copper, coaxial cable, fiber, spectrum, or any other medium.

This definition establishes a coherent deregulatory national policy while continuing to allow the market, not the desire to fit in a particular regulatory box, to shape providers' decisions as to how to invest and innovate in this fast-growing area. IP-enabled services should be designed to follow technology evolution as IP standards and services evolve. One example of this evolution is the definition of the IPv6 protocol, and the gradual transition from IPv4 to hybrid IPv4/IPv6 networks. Another example of this evolution is the role of the Multi-Protocol Label Switching ("MPLS") protocol in providing both current and advanced IP services. IP-

enabled services should include platform services provided over customer interfaces with new and evolving protocols that extend the capabilities of IP, including MPLS.[21]

B. All IP-Enabled Services Using the PSTN Should Be Treated Equal

The Commission asks for comment as to how, if at all, it should differentiate among various IP-enabled services to ensure that any regulations applied to such services are limited to those cases in which they are appropriate.[22] Certain categories of IP-enabled services, especially voice over Internet protocol ("VoIP") or similar services using or terminating voice traffic to North American Numbering Plan ("NANP")/PSTN telephone numbers, should not only be treated as interstate in nature and subject to the Commission's exclusive jurisdiction, but also subject to universal service fund funding obligations without double taxation or assessment at the facility level; appropriate E911 and disabilities access obligations; and CALEA-like accommodations where shown by industry collaborations to be technically and economically

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[21] Currently, the MPLS protocol is primarily used within service provider networks, since standards for interconnecting networks with MPLS and delivering MPLS to customers are not fully mature. MPLS is a key protocol that service providers use to provide IP services to their customers, such as IP Virtual Private Network ("VPN") services, and hence is part of the IP platform in BellSouth's proposed definition above. MPLS facilitates using a common network infrastructure to provide new and enhanced IP services, with added levels of security, reliability, and Quality-of-Service ("QoS") assurances. These services are of growing importance to business customers and enterprise networks. Service providers and standards organizations are pursuing the specification of MPLS Network to Network Interface ("NNI") protocols that will enable service providers to offer IP services via an MPLS interface to their customers. A single MPLS service interface could offer customers an integrated customer interface for multiple IP services and other advanced data services. Business customers are already expressing interest in MPLS services and interfaces. As MPLS interfaces are deployed and grow in popularity for business services, they may also evolve to serve small business and residential customers. As an example, MPLS could be especially useful for residential customers that share a broadband access line across multiple applications such as Internet surfing, packet voice, interactive video, and a secure "work-at-home" connection to the internal IP network of their employer.

In order to remain relevant in the rapidly evolving environment of data networks, the definition of IP-enabled services should include services delivered to customers over IPv4, IPv6, and MPLS interfaces as well as new protocols that develop as these data networking technologies continue to evolve.

[22] *NPRM* ¶ 35.

reasonably achievable. As explained more fully below, these services should comply with E911 requirements that are both economically and technically reasonably achievable given the nature of the technology and the associated costs. The Commission should allow the industry to develop reasonable solutions for accomplishing E911 requirements through the adoption of open and voluntary industry standards prior to imposing any government mandated standards, and consider carefully funding requirements even as technical solutions are being defined.

IP-enabled services that do not, on the other hand, interconnect with the PSTN (for example, what the Commission has traditionally classified as "computer-to-computer" Internet communications,[23] private carriage and certain satellite transmission based services) should not be subject to any new or legacy economic regulation, including PSTN access charges, E911 obligations, or universal service funding obligations. [24] The extent, if any, to which these and other IP-enabled services that do not interconnect to the PSTN ought to be subjected to requirements to accommodate law enforcement needs should be addressed in a separate proceeding.[25]

Finally, as demonstrated in Section III below, IP-enabled services continue to become an increasingly critical component of the nation's infrastructure. Service providers are expanding beyond Internet-based services and therefore must increasingly be able to provide services with

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[23] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd 11501, 11543, ¶ 87 (1998) ("*Report to Congress*").

[24] Another example is the Free World Dialup service that was specifically described and considered in the *Pulver.com Declaratory Ruling. Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, *Memorandum Opinion and Order*, 19 FCC Rcd 3307 (2004) ("*Pulver Declaratory Ruling*").

[25] *Comment Sought on CALEA Petition for Rulemaking*, RM-10865, *Public Notice*, DA 04-700 (rel. Mar. 12, 2004); Comments of BellSouth Corporation, RM-10865 (filed Apr. 12, 2004).

higher levels of security and reliability. These advanced networks are vulnerable to denial-of-service attacks, domain naming system ("DNS") attacks and hi-jacking, spoofing, traffic pattern choke points, attacks on administrative interfaces of network components, routing protocol attacks/spoofing, session hi-jacking, and attacks through physical access to network components. IP platform providers, in response, may provide solutions through network-based IP-virtual private networks ("VPNs"), strong authentication of endpoints, network management and monitoring technologies and processes, selective rate limiting, traffic classification and prioritization, routing/signaling security techniques, use of access control lists, and physical security. As the Commission builds a record on the variety of IP-enabled services, it should be cognizant of, and where appropriate seek comment on, security issues related to IP-enabled services, applications and platforms.

III. THE COMMISSION SHOULD OCCUPY THE FIELD AND ESTABLISH A COMPREHENSIVE NATIONAL POLICY OF DEREGULATORY PARITY FOR ALL IP-ENABLED SERVICES

As the Commission has properly noted, "[a]s communications migrate from networks relying on incumbent providers enjoying monopoly ownership of underlying transmission facilities to an environment relying on numerous competing applications traversing numerous competing platforms, power over the prices and terms of service necessarily shifts from the provider to the end user."[26]

The Commission's analysis is precisely right. In the context of IP-enabled services, this shift is already occurring at a rapid rate, resulting in more choices for consumers and obviating any need for economic regulation. The current IP-enabled services market is characterized by

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[26] *NPRM* ¶ 36. BellSouth estimates that, taking into account wireless and Internet communications, the former narrowband monopoly networks account for less than half of domestic telecommunications.

competition, supplier diversity, and competitive neutrality. The Fact Report filed in this proceeding confirms the *NPRM*'s observation that multiple providers are now offering IP-enabled services over cable, wireline, and wireless platforms and that that these services compete in price, service quality, and functionality with those traditionally provided by ILECs.[27] Further, the Fact Report, and the records created in various other proceedings pending at the Commission,[28] demonstrate that the Internet generally, and IP-enabled services in particular, support many new features and functionalities that are often provisioned as part of a bundled offering in a way that makes traditional end-to-end geographical jurisdictional analysis irrelevant and that, if they had to be classified under existing legacy regulatory classifications, would be most accurately viewed as information services.[29]

A. IP-Enabled Services, Like Broadband Internet Access Services, Are Inherently Interstate and Thus Subject to the Commission's Exclusive Jurisdiction

As explained in section IV below, as a matter of law, IP-enabled services, like broadband Internet access services, are inherently interstate and subject to the Commission's exclusive jurisdiction. In the various IP-related proceedings that have been initiated, commenter upon commenter has explained why, as a matter of sound policy, the Commission should take a leadership role in establishing a comprehensive regulatory framework for IP-enabled services.

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27 Peter W. Huber & Evan Leo, Competition in the Provision of Voice Over IP and Other IP-Enabled Services, Prepared for and Submitted by BellSouth, Qwest, SBC, and Verizon, WC Docket No. 04-36, May 28, 2004 ("Fact Report").

28 *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266; *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211.

29 *IP-Enabled Services*, WC Docket No. 04-36, Petition of SBC Communications Inc. for a Declaratory Ruling at 44-45 (filed Feb. 5, 2004) ("SBC Declaratory Ruling Petition").

Most recently, SBC described the threat to "unregulation" in general and the Internet's growth in particular as a "siege" against the Commission's deregulatory approach to the Internet that is taking place in a variety of forums, "including state commissions, state legislatures, courts throughout the United States, and even the Commission itself."[30] SBC explains that regulatory issues relating to IP platform services are being raised in a patchwork of discrete, service-specific proceedings, both before the courts and in the states. Those proceedings can obscure and complicate larger issues about the appropriate regulatory treatment of the Internet[31] as well as the broadband access services that are clear examples of IP platform services. The Commission catalogues many of these proceedings in the *NPRM*.[32]

All this creates is a climate of regulatory uncertainty that is not conducive to investment and innovation. That this Commission must proceed apace on both fronts is demonstrated by the reality that courts and states will continue to fill any regulatory void created by the Commission's passivity. The United States Court of Appeals for the Ninth Circuit has already done so when it vacated a part of this Commission's *Cable Modem Declaratory Ruling*[33] by relying on an earlier case by the same three-judge panel in which the panel "took pains to 'note at the outset that the FCC has declined, both in its regulatory capacity and as amicus curiae, to

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30 *Id.* at 18.

31 *Id.* at 19.

32 *NPRM* at nn. 113-15.

33 *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 & CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*").

address the issue'" before the Court.[34] Although the holding is limited, and under appeal, it has caused unnecessary confusion and upheaval when communications markets least need it.

Meanwhile, and as the Commission notes in its *NPRM,* at least two state legislatures have passed laws pertinent to VoIP,[35] and a number of state regulatory authorities are considering the issues raised by VoIP either on their own, or in response to petitions from interested parties.[36] The New York Public Service Commission recently ruled that Vonage is a "telephone corporation as defined by New York state law," although it would "not be subject to economic or rate regulation."[37] Similarly, the Minnesota PUC last year ruled that Vonage's VoIP offering is a telecommunications service; that decision was vacated by the United States District Court.[38] Two of the states in which BellSouth provides local exchange service have dealt or could deal with VoIP prior to this Commission: Florida has enacted legislation excluding VoIP from the definition of "services" subject to the jurisdiction of the Florida Public Service Commission,[39] thus compelling the Florida Commission to decline to address a declaratory ruling from a VoIP provider;[40] meanwhile, in Alabama, 31 incumbent local exchange carriers (ILECs, not including

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34 *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1131 (9th Cir. 2003).

35 Fla. Stat. chs. 364.01(3), 364.02(12) (2003); Pa. Senate Bill 900, Session of 2003, *available at* http://www.legis.state.pa.us/WU01/LI/BI/BT/2003/0/SB0900P1202.HTM.

36 Alabama, California, Colorado, Illinois, New York, Ohio, and Wisconsin.

37 State Telecom Activities, Communications Daily, May 20, 2004.

38 *NPRM* at n.114.

39 Fla. Stat. chs. 364.01(3), 364.02(12) (2003).

40 *Petition of CNM Networks, Inc. for Declaratory Statement that CNM's Phone-to-Phone Internet Protocol (IP) Telephony Is Not "Telecommunications" and that CNM Is Not A "Telecommunications Company" Subject to Florida Public Service Commission Jurisdiction*, Docket 021061-TP, Order Denying Petition for Declaratory Statement (Fla. P.S.C. Dec. 31, 2002).

BellSouth) have petitioned the Alabama Public Service Commission to declare VoIP providers subject to intrastate access charges.[41] Thus the Commission notes that, "[e]ven at this early stage, states have begun to diverge in their approaches to the regulation of VoIP services."[42] But even if all the states ultimately agree on an appropriate deregulatory approach, the uncertainty created in the current environment and the time and resources necessary to litigate these issues on a state-by-state basis undermine investment and divert funds that could be used for investment and innovation.

In light of all this, it is clear that this Commission must develop a national policy framework for VoIP in order to avoid continued, and possibly inconsistent, judicial construction of a statute for which the agency has the special expertise to construe, as well as potentially diverse and inconsistent state determinations. The Commission must announce both its intention to establish this policy immediately, and its resolve to conclude this proceeding with dispatch, in order to provide federal courts, and state legislatures and commissions, with assurances that they may voluntarily abstain from deciding cases or controversies in advance of the Commission's national policy determinations.

B. Because the Markets for IP-Enabled Services and Broadband Internet Access Are Highly Competitive and Not Characterized by Monopoly Conditions, There is No Compelling Rationale for Applying Traditional Economic Regulation to Any Provider of IP-Enabled Services

IP-based services are typically characterized by low barriers to entry, making this market highly competitive without any need for governmental intervention. Inappropriate regulation of

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41 *In Re: Petition for a Declaratory Order regarding the classification of IP Telephony Service*, Docket 29016 (Ala. P.S.C. filed July 31, 2003). *See generally*, Wiley, Rein & Fielding LLP, VOIP At The Crossroads, A Roadmap of Current Governmental Activities Regarding Voice-Over-the-Internet Services (February 2004).

42 *NPRM* ¶ 34.

these services would discourage innovation and investment, and would be in danger of being unable to keep pace with the rapidly developing technology. In fact, a look at the current market shows this, as there are already multiple providers of VoIP offering services in nontraditional ways.[43]

1. The IP-Enabled Services Market Is Characterized by Robust Intermodal Competition and Supplier Diversity

The Fact Report demonstrates that, since the beginning of this year, each of the six major CATV operators –whose networks alone reach 85 percent of U.S. households and which account for 90 percent of all cable modem subscribers – has either begun commercial deployment of IP telephony service or has announced aggressive plans to do so imminently.[44] This includes 4.4 million homes served by one CATV provider in metropolitan New York, New Jersey and Connecticut, and with another major IP telephony provider on track to provide IP telephony to essentially all of its 18 million homes passed by the end of this year. [45]

Hosted voice providers such as Vonage dominate the U.S. cable VoIP market, maintaining approximately 66 percent of the cable VoIP subscriber base in 2003.[46] Additional hosted voice service providers include 8x8, Galaxy Internet, DSLi, VoicePulse, Net2Phone and theglobe.com.[47] Cable operators themselves, free from the kind of legacy economic regulation that cripples ILEC provision of broadband access services, continue to invest in their own VoIP

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43 *NPRM* ¶¶ 12-22; Fact Report at 2-11 & Table 1.

44 Fact Report at 5 & Table 1.

45 *Id.* at 6.

46 Lindsay Schroth, *Activity Heats up in the Global Cable VoIP Market*, Broadband Access Technologies (The Yankee Group May 2004) at 4 ("Schroth").

47 *Id.*

infrastructure, and are expected to dominate the consumer cable VoIP market by the end of this year.[48]

In addition to Cablevision, the "early cable leader in the VoIP business . . . in terms of customers,"[49] and Time Warner Cable, noted above and by the Commission in its *NPRM*,[50] Comcast, the nation's largest cable operator, is holding market trials in Philadelphia and Detroit, with plans to introduce further market trials in Hartford, Indianapolis and Springfield, Massachusetts. Four of these trials are expected to turn to full market launches, while 2005 is expected to be "Comcast's year for mass-market deployment."[51] Meanwhile, Charter has announced that it will expand its primary-line VoIP service to other franchise areas this year,[52] while Cox's "understanding of marketing and selling a telephony service, as well as its technical expertise and superior network design," will help it "deliver one of the highest quality primary-line VoIP services in the market"[53] and thus caused Cox to proclaim that "VoIP is now ready for prime time."[54]

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48 Schroth at 4.

49 Alan Breznick, *Cable MSOs Pick Up VoIP Pace, Shrug Off Vonage*, Communications Daily, May 24, 2004.

50 *NPRM* ¶12 ("Time Warner Cable predicts that it will offer IP telephony to all of its subscribers by the end of 2004").

51 Schroth at 5. The company hopes to reach all 40 million households by the end of 2006. Peter Grant, *Comcast Pushes Into Phone Service*, Wall St. J., May 26, 2004, at A3.

52 "Charter's plans call for introducing VoIP in Mo., New England and a larger swath of Wis., making the service available to at least 500,000-600,000 homes by year end." Breznick, Communications Daily, May 24, 2004.

53 Schroth at 5.

54 Cox Communications White Paper, Voice over Internet Protocol: Ready for Prime Time (May 2004), *available at* www.cox.com/about/newsroom.

Traditional CLECs and interexchange carriers have either begun deploying VoIP services or announced plans to do so, shifting from a UNE platform approach to a facilities-based approach.[55] AT&T had made a commitment to deploy mass-market VoIP service in the top 100 MSAs by the end of this year,[56] and plans to introduce a managed IP telephony service as well as the market's first "Hosted IP PBX Service" to its business enterprise customers.[57] MCI plans to launch a consumer voice-over IP initiative this year[58] and already has the widest enterprise deployment in the United States of an IP Centrex-like service – "MCI Advantage."[59] Sprint partners with equipment vendors Cisco and Nortel to provide Managed IP Telephony to its business enterprise customers, and is planning to introduce a network-based, IP-Centrex-like service this year.[60] Each of the BOCs, the most recent entrants in the market, currently provide or have plans to offer IP-based services such as IP VPN, Centrex or IP Centrex-like services and Hosted IP services to enterprise customers, while Qwest and Verizon have announced plans to deploy consumer VoIP services.[61]

As the Commission notes, BellSouth, utterly non-dominant in both the provision of IP-enabled services and broadband Internet access services, plans to roll out service to small to

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55 Fact Report at 8-9.

56 *Id.* at 8.

57 Steve Koppman, *Retail Business VoIP: North American Carrier Profiles*, at 2, Gartner Market Analysis, Feb. 27, 2004 ("Gartner Market Analysis").

58 Fact Report at 8.

59 Gartner Market Analysis at 5.

60 *Id.* at 3-4.

61 Fact Report at 10-11.

medium enterprise customers in nine states throughout 2004,[62] and the company has offerings planned for large enterprise customers as well. Indeed, BellSouth is developing a new network-based IP application offering that combines, in a single offer, many of the new applications that the Commission identifies in its NPRM that are at the heart of the "virtuous circle":[63] "any distance" voice communications service, voicemail, email, integrated directory service, unified messaging service, Internet access, conferencing and collaboration along with a network solution supporting data and voice applications. BellSouth will also provide IP phones or other premises equipment as needed, as well as professional services for implementation, integration and support.

New entrants such as Vonage and Level 3 have already made significant inroads against older established CLECs such as Z-Tel and AT&T, offering nationwide service and, essentially, geographic number portability, enabling them to compete against and displace traditional long distance carriers and terminating ILECs alike.[64] The competition is fierce. "Last week, AT&T expanded its "CallVantage" VoIP service throughout the western U.S., beyond its established markets . . . . For its part, Vonage, the overall VoIP market leader with 155,000 lines of service, cut the monthly price of its flagship calling plan $5 to $29.99."[65] Finally, as noted in the Fact Report, a number of VoIP providers (such as Skype, pulver.com, Net2Phone and InPhonex) that

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62 *NPRM* ¶ 13.

63 *Id.* ¶¶ 17, 18.

64 Fact Report at 8-9.

65 Breznick, Communications Daily, May 24, 2004.

do not own or operate any facilities and that use the public Internet provide additional competition for voice communications.[66]

The result of all of this largely unregulated (with the significant exception of the BOC new entrants) investment activity is that VoIP services are now competitive with those available over traditional circuit-switched networks, and in most cases are cheaper and provide more features and functionality.[67] That entry barriers are low is an understatement; for broadband households, the incremental capital cost of adding VoIP services is "effectively zero" and the only incremental equipment-related capital cost of adding the service is for inexpensive CPE and the relatively cheap call-management network equipment, and even these costs are "dropping rapidly" even as today's total incremental capital costs for adding VoIP to broadband customers range from around $5 for hosted services like Vonage's to $7-$9 per month for cable operators.[68] Thus, with a price of $34.95 per month and a profit margin of 40-45%, Cablevision, the early cable leader, can recoup its investment just 10 months after signing up a new customer.[69] And although it costs more to provide VoIP service to customers who do not already subscribe to broadband service, consumer household spend on the average mix of voice and vertical narrow band services exceeds the average price of broadband service.[70] Households can even capture

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66 Fact Report at 9-10.

67 *Id.* at 11.

68 *Id.* at 11-15.

69 Breznick, Communications Daily, May 24, 2004.

70 Fact Report at 16-18.

net savings today by subscribing to broadband services and migrating to VoIP services, and, as the Fact Report demonstrates, these savings will become even greater with time.[71]

2. The Market for Broadband Internet Access Is Equally Competitive

As the Fact Report notes, the main prerequisite for providing VoIP service is a broadband connection, which between 85 and 90 percent of U.S. households can now obtain from a provider other than their incumbent local telephone company.[72] Indeed, as of August 2003, cable operators provided cable modem service in 94 percent of the metropolitan statistical areas ("MSAs") in which BellSouth provided DSL service, providing competitive broadband Internet access service to 98% of all households in BellSouth's service territory.[73]

In the time since both the Commission and the D.C. Circuit separately found there to be "robust" intermodal competition in the broadband market, prices have substantially decreased as

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71 *Id.* at 17.

72 *Id.* at 1.

73 One or more cable operators, including Adelphia, Bright House, Charter, Comcast, Cox Communications, Insight Communications, Mediacom and Time Warner Cable, provided cable modem service in competition with BellSouth's DSL service in the following 60 MSAs: Atlanta, Miami, Fort Lauderdale, New Orleans, Nashville, Birmingham, West Palm Beach-Boca Raton, Charlotte-Gastonia-Rock Hill, Memphis, Louisville, Jacksonville (Florida), Greenville-Spartanburg-Anderson, Raleigh-Durham-Chapel Hill, Orlando, Baton Rouge, Jackson (Mississippi), Greensboro-High Point-Winston Salem, Mobile, Columbia, Knoxville, Charleston-North Charleston, Shreveport-Bossier City, Daytona Beach, Melbourne, Montgomery, Huntsville, Augusta-Aiken, Macon, Savannah, Columbus, Florence, Panama City, Tallahassee, Tampa-St. Petersburg-Clearwater, Albany, Monroe, Goldsboro, Wilmington, Chattanooga, Owensboro, Tuscaloosa, Pensacola, Florence, Lexington, Hattiesburg, Fort Pierce-Port St. Lucy, Henderson, Gainesville, Clarksville-Hopkinsville, Alexandria, Lafayette, non-metro out-state Georgia, Athens, non-metro out-state Kentucky, Ocala, Lake Charles, Asheville, Sumter, non-metro out-state North Carolina, Auburn-Opelika, Houma, non-metro out-state Tennessee, non-metro out-state Mississippi, Hickory, Johnson City-Kingsport-Bristol, Decatur, non-metro out-state Alabama and non-metro out-state Florida. The four MSAs in which cable operators did not provide cable modem service as of August, 2003 were Anniston, Biloxi-Gulfport-Pascagoula, Gadsden, and Jackson (Tennessee) and comprise less than 2 percent of the households in BellSouth's serving territory.

broadband subscribership has steadily increased.[74] Broadband over cable is now available to more than 85 percent of all U.S. households and should be available to 90 percent by the end of the year.[75] Further, small businesses are increasingly turning to cable, with a recent study showing 2.1 million such businesses using cable modem service compared to 1.4 million using DSL.[76] Moreover, interexchange carriers, not ILECs, have captured most of the business broadband market.[77]

The Fact Report also documents that significant intermodal mass-market competition continues to grow.[78] This competition comes from fixed wireless providers such as NTELOS, SR Telecom, WindChannel Communications, Adams NetWorks, AirTap Communications, Plateau Telecommunications, NextNet and America Connect that have deployed and continue to deploy fixed wireless broadband service offerings to mass market and enterprise customers.[79] The nation's largest electric utility companies have been conducting broadband over power line ("BPL") trials in a number of states, and it is estimated that BPL will reach between 750,000 and 1 million customers by the end of this year and could encompass 6 million power lines by 2006, bringing the electric utilities additional revenues of $3.5 billion.[80] The Fact Report also documents the re-emergence of the satellite industry as a competitive presence in the broadband

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74 Fact Report at Appendix A, Tables 1, 2 & 3, A-4 – A-6.

75 *Id.* at A-2. As the Fact Report also notes, cable companies still control approximately two-thirds of all high-speed lines provided to mass-market customers, and just as many, if not more customers are describing to cable modem service each quarter than to DSL. *Id.* at A-1.

76 *Id* at A-3 – A-4.

77 *Id.* at A-19.

78 *Id.* at A-8 – A-21.

79 *Id.* at A-9 – A-13 & Table 5.

80 *Id.* at A-14 – A-16.

marketplace, and provides the following comparison of typical residential and small business offerings by each of the foregoing non-cable, non-telco intermodal broadband competitors:

Typical Residential Offerings by Alternative Broadband Providers				
Technology	**BPL**	**Satellite**		**Fixed Wireless**
Provider	**Prospect Street Broadband**	**DIRECWAY**	**StarBand**	**NTELOS Portable Broadband**
Downstream Bandwidth	200-300 kbps	500 kbps	200-500 kbps	1.5 Mbps
Upstream Bandwidth	200-300 kbps	50 kbps	40-60 kbps	550 kbps
Monthly Price	$26.95	$59.99-$99.99	$39.99-$99.99	$49.95-$69.95
Availability	Manassas, VA	Continental U.S.	Nationwide	VA Cities
Sources: Fact Report Table 5				

Typical Small-Business Offerings by Alternative Broadband Providers			
Technology	**Satellite**		**Fixed Wireless**
Provider	**DIRECWAY**	**StarBand Small Office**	**NTELOS Portable Broadband**
Downstream Bandwidth	200 kbps-1.5 Mbps	150 kbps-1 Mbps	1.5 Mbps
Upstream Bandwidth	n/a	40-100 kbps	550 kbps
Monthly Price	$75.99-$189.99	$119.99-$169.99	$49.95-$69.95
Sources: Fact Report Table 6			

Finally, the Fact Report confirms extensive competition for broadband services to the large business enterprise market.[81] As Verizon has conclusively demonstrated, there is no separate "wholesale" market for broadband services in which local telephone companies could

[81] *Id.* at A-19 – A-21; *see also* Letter from Dee May, Assistant Vice President – Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-337, *et al.*, at 17-19 (Nov. 13, 2003) ("Dee May *ex parte*").

exercise market power.[82] The extensive records compiled in the *Broadband Non-Dominant* proceeding,[83] the *Cable Modem Declaratory Ruling* proceeding,[84] the *Wireline Broadband Internet Access* proceeding and the *Triennial Review* proceeding, as supplemented by the evidentiary record and in particular by the Fact Report in this proceeding demonstrate conclusively the competitiveness of broadband services in general and broadband Internet access services in particular.

C. All IP-Enabled Service Providers, Though Free from Economic Regulation, Should Contribute to Universal Service, Be Subject to a Unified PSTN Intercarrier Compensation Regime, and Provide Emergency 911 Services, Law Enforcement Assistance and Other Important Social Policy Objectives

As discussed in more detail below, the Commission can ensure that market forces, not regulation, drive the development of IP-enabled services in two main ways. First, the Commission can and should treat all IP-enabled service and network providers equally. To the extent that a particular IP-enabled service is an "information service" under the law, the Commission should leave such services largely unregulated except to the extent that, under its Title I authority, the Commission needs to establish clear expectations with regard to social obligations such as public safety, universal service, 911 and disability access. To the extent that a particular IP-enabled service is a "telecommunications service" under the Commission's rules, the Commission should use all of its available powers to remove Title II legacy economic regulation. As the Commission notes, traditional economic regulation designed for the legacy

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82 Dee May *ex parte passim.*

83 *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337.

84 *Supra*, note 33.

network will be inapplicable in the case of most IP-enabled services.[85] Simply put, the regulatory framework should be constructed so that all analogous IP-enabled services are treated the same, regardless of transmission technology or legacy regulation. Thus, both IP-enabled telecommunications and information services should be similarly regulated regardless of which bucket they fall in and regardless of whether those services are provided over wireline, wireless, coaxial cable, or other medium. The underlying bucket or medium should simply have no relevance for determining what the rules are when the service provided over such medium is the same.

Second, a regulatory framework designed to provide incentives to invest in new services and facilities will eventually require a comprehensive and holistic overhaul of current universal service funding and PSTN access charge regimes that will eliminate opportunities for arbitrage. As BellSouth explains in Section IV, the Commission should take steps in this proceeding to level the playing field in both these areas even as it works toward a resolution of those pending proceedings in a way that results in a competitively neutral mechanism for universal service funding and a unified intercarrier compensation regime that eliminates existing distortions and arbitrage opportunities. By doing so, the Commission will eliminate any incentive for carriers to characterize their IP-enabled service offerings exclusively to avoid legitimate contribution and compensation obligations.[86]

In the meantime, however, the appropriate policy framework for IP-enabled services should be predicated on the assumptions that, irrespective of any application's legacy regulatory classification as a "telecommunications" or "information" service, and whether or not the IP-

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85 *NPRM* at n.116.

86 *See* Comments of BellSouth, WC Docket No. 03-266, at 8-9 (filed Mar. 1, 2004).

enabled application is provided over broadband or narrowband transmission facilities, all categories of IP-enabled services should pay carrier access charges for use of the PSTN. BellSouth agrees with the Commission's policy statements that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network" and that "the cost of the PSTN should be borne equitably among those that use it in similar ways.[87] In addition, certain limited categories of IP-enabled services (such as VoIP services using or terminating traffic to PSTN TNs) should not only be treated as interstate in nature and subject to exclusive FCC jurisdiction; but should also be subject to (1) USF charges without double taxation/assessment at the facility level; (2) appropriate E911 and ADA obligations; and (3) law enforcement accommodations where shown by industry collaborations to be technically and economically reasonably achievable.

In the following sections, BellSouth demonstrates how the Commission should treat, under existing law, both IP-enabled information services and IP-enabled telecommunications services in a way that achieves deregulatory parity for similar services and service providers.

IV. THE COMMISSION HAS AMPLE LEGAL AUTHORITY TO CREATE A DEREGULATORY NATIONAL POLICY FRAMEWORK FOR IP-ENABLED SERVICES UNDER BOTH TITLE I FOR INFORMATION SERVICES AND TITLE II FOR TELECOMMUNICATIONS SERVICES

To avoid regulatory uncertainty, and thus promote immediate investment and innovation, the Commission should promptly exercise its regulatory authority under both Title I and Title II to ensure a deregulatory framework for IP-enabled services in which competing services are

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87 *NPRM* ¶ 33.

subject to the same regulatory regime, regardless of transmission technology or legacy regulation.

A. Proper Regulatory Treatment of IP-Enabled Information Services: A Preemptive Federal Policy of No Economic Regulation, Compensation for PSTN Access, Contributions to Universal Service and Minimally Intrusive Social Policy Regulation

1. Most IP-Enabled Services Qualify as Information Services

The Telecommunications Act defines an information service as a service that offers a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[88]

Most IP-enabled services will meet this definition. Indeed, in the *Pulver Declaratory Ruling*, the Commission already determined that one form of IP-enabled service, Pulver's Free World Dialup ("FWD"), qualified as an information service because, among other things, it allowed members to "acquire" information about whether other members were online, "stores" member information and voicemail messages, provides members with passwords and other information that they "utilize," and "processes" information to determine whether the person with whom a member seeks to communicate is online and available.[89] The Commission reasoned that the existence of these functions as part of Pulver's FWD offering was sufficient to qualify that offering as an information service even though, "after performing these specific functions, Pulver no longer plays a role in the exchange of information between its members . . . . The fact that the information service Pulver is offering happens to facilitate a direct disintermediated voice communication, among other types of communications, in a peer-

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88 47 U.S.C. § 153(20).

89 *Pulver Declaratory Ruling*, 19 FCC Rcd at 3313, ¶ 11.

to-peer exchange cannot and does not remove it from the statutory definition of information service . . . ."[90]

Just like Pulver's FWD service, many other IP-enabled services involve the capability to store, utilize, acquire and/or process information. Those services likewise qualify as information services. For instance, as SBC properly noted in its Petition for Declaratory Ruling, many IP-enabled services include, as an integrated part of the offering, functionalities that allow consumers to control aspects of their communications from their desktop, to integrate voice and data (and even video), and to obtain enhanced functionalities, such as voicemail.[91] AT&T's Call Vantage offers "multiple advanced features such as call logs, unified messaging, settable do-not-disturb periods, 'locate me' functionality, and virtual conference call functionality."[92] AT&T has stressed that the unique features offered by its service "will all be accessible from any personal computer, web-enabled PDA or phone keypad."[93] Vonage enables customers to "alter their phone line's settings (call forwarding, call waiting, etc.), track real-time usage, or check voice mail all through the Internet."[94] Packet8 "offer[s] a videophone service and hardware."[95]

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90 *Id.* at 3314, ¶ 12.

91 *See* SBC Declaratory Ruling Petition at 44-46.

92 L. Warner, *et al.*, Credit Suisse First Boston Equity Research, *AT&T Launches VoIP in New Jersey: Competition for Voice Customers Accelerating* at 1 (Mar. 29, 2004).

93 AT&T News Release, *Dorman Outlines Aggressive, Continuing Transformation of AT&T as the "World's Networking Company"* (Feb. 25, 2004).

94 J. Barrett, Park Associates, *Residential Voice-over-IP: Analysis & Forecasts* at 4-3 (Jan. 2004).

95 *Id.* at 4-4.

VoicePulse offers an "'Open Access' plan, which allows subscribers to use the service via any appropriately configured device such as a PDA, laptop, or IP phone."[96]

Because of the vast potential for IP technology, more enhanced features are being added into IP-enabled products all the time. As Vonage explains, "[t]he velocity of innovation VoIP entails is amazing. Vonage has been deploying a new service feature every six weeks, on average (which it can achieve with a software push to the adapter). This compares to as much as a year or more in the traditional incumbent environment."[97] Some of the anticipated features and functionality include Web-based customization that enables the user to set special ring tones for different callers, instant line provisioning, customized call-blocking, more advanced unified messaging and message management capabilities, and video-conferencing.

As explained above, BellSouth is developing a new network-based IP application offering that combines, in a single offer, many of these new applications: "any distance" voice communications service, voicemail, email, integrated directory service, unified messaging service, Internet access, conferencing and collaboration along with a network solution supporting data and voice application. BellSouth will also provide IP phones or other premises equipment as needed, as well as professional services for implementation, integration and support.

The inclusion of these enhanced functionalities as an integral part of an IP-enabled services means that the entire service is properly treated as an information service. As the Commission has stated with regard to broadband Internet access, these functionalities are an inherent part of overall information services "regardless of whether subscribers use all of the

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96 *Id.* at 4-6.

97 D. Barden & D. Shapiro, Banc of America Securities Equity Research, *Straight Talk on VoIP* at 3 (Apr. 15, 2004).

functions provided as part of the service . . . and regardless of whether every . . . service provider offers each function that could be included in the service."[98]

It would undermine competitive innovation and harm consumers to require IP-enabled service providers to separate out these functionalities and offer them independently of IP-based transmission. As the D.C. Circuit long ago explained in an analogous situation, the Commission need not take such counterproductive steps: "We agree with the Commission that even if some enhanced services could be classified as common carrier communications activities, the Commission is not required to subject them to Title II regulation where, as here, it finds that it cannot feasibly separate regulable from nonregulable services."[99] The court further noted that "[o]nce the difficulty of isolating activities subject to Title II regulation outweighs the benefits to be gained by that regulation, then the Commission is justified in conserving its energies for more efficacious undertakings, at least when it establishes an alternative regulatory scheme under its ancillary [Title I jurisdiction."[100]

2. These Information Services Are Subject to This Commission's Jurisdiction Under Title I

Title I of the Communications Act gives the Commission exclusive jurisdiction over "all interstate and foreign communication by wire or radio."[101] The same title further provides that

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98 *Cable Modem Declaratory Ruling,* 17 FCC Rcd at 4822-23, ¶ 38.

99 *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 210 (D.C. Cir. 1982).

100 *Id.* at 211.

101 47 U.S.C. § 152(a). The terms of these provisions are quite broad. Section 153(33) defines a "radio communication" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." Section 153(52) defines "wire communications" as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission,

the "Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions."[102]

As this expansive language makes clear, Title I affords the Commission broad authority to establish regulations that are necessary and appropriate to craft a regulatory regime for IP-enabled services that relies on the market to provide the right economic incentives but adopts sufficient regulations to address important social concerns. Indeed, it has long been the function of Title I to allow the Commission to address revolutionary developments such as the rise of IP-enabled services: "Congress sought to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications."[103] The Supreme Court thus explained decades ago that Title I is a core element of the "comprehensive mandate" that Congress has given to this Commission to ensure rational treatment of "a field that was demonstrably both new and dynamic."[104] Thus, as the Commission has explained, "[f]ederal courts have long recognized the Commission's authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the

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including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." In *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), the Court noted that the definitions of "communication by wire" and "communication by radio" in section 153 evidence a congressional intent that the FCC "was expected to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." *Id.* at 660 (citation omitted). Therefore, section 152(a) is "not limited to the precise methods of communication" known to Congress in 1934. *Id.* at 678.

[102] 47 U.S.C. § 154(i).

[103] *Computer & Communications Indus. Ass'n*, 693 F.2d at 213 (internal quotation marks omitted).

[104] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968) (internal quotation marks omitted).

absence of explicit regulatory authority, if the regulations are reasonably ancillary to existing Commission statutory authority."[105]

Indeed, even before passage of the 1996 Act, this Commission properly determined in the *Computer Inquiry* proceeding that it was appropriate to exercise jurisdiction over information services (then known as enhanced services) under Title I.[106] The D.C. Circuit affirmed that exercise of authority in full, reasoning that, among other things, the Commission's actions were "reasonably ancillary" to its responsibility to "assure a nationwide system of wire communications services at reasonable prices."[107]

With the passage of the 1996 Act, it is particularly clear that this Commission has ancillary jurisdiction to "perform any and all acts" necessary to ensure rational, pro-competitive government treatment of IP-enabled services. In addition to its responsibility of assuring a "nationwide system of wire communications services at reasonable prices," the Commission's statutory responsibilities now include implementing Congress's policy of "promot[ing] the continued development of the Internet and other interactive computer services and other interactive media" and "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[108] Moreover, section 706 of the 1996 Act charges the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced

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105 *Cable Modem Declaratory Ruling,* 17 FCC Rcd at 4841, ¶ 75.

106 *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* Docket No. 20828, *Final Decision,* 77 F.C.C.2d 384, 430-35, ¶¶ 119-32 (1980) (*"Computer II"*).

107 *Computer & Communications Indus. Ass'n,* 693 F.2d at 213.

108 47 U.S.C. § 230(b).

telecommunications capability to all Americans" through "measures that promote competition" and "regulating methods that remove barriers to infrastructure investment."[109] By removing asymmetrical regulations that may artificially discourage investment and innovation by some providers (and in some technologies), the Commission would be helping to ensure the "'achievement of [these] statutory responsibilities,'" and thus acting within the proper scope of its authority under Title I.[110]

3. The Commission Should Establish That It Has Exclusive Jurisdiction over IP-Enabled Information Services and Thus Preempt Disruptive and Unnecessary State Communications Regulation

Even before the dawn of the Internet, "federal authority" was "preeminent in the area of information services."[111] In particular, in the *Computer Inquiry* proceeding, the Commission determined that enhanced services would "continue to develop best in an unregulated environment and . . . [that] regulation of enhanced services was . . . unwarranted."[112] To the extent that states have tried to impose different policies, the Commission acted to preempt those decisions, with the result that "states have played a very limited role with regard to information services."[113]

The need for exclusive Commission authority over information services (as well as IP-enabled telecommunications service) is even more pronounced in the age of the Internet. As the Commission explained in the *NPRM*, packet-based Internet communications "defy jurisdictional

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109 *Id.* § 157 note.

110 *Cable Modem Declaratory* Ruling, 17 FCC Rcd at 4841, ¶ 75 (quoting *United States v. Midwest Video Corp.*, 440 U.S. 649, 706) (1972)).

111 *Pulver Declaratory Ruling*, 19 FCC Rcd at 3316, ¶ 16.

112 *Id.* at 3317, ¶ 17.

113 *Id.* at 3318, ¶ 17 & n.63 (citing examples of preemption).

boundaries" because packets are "routed across a global network with multiple access points."[114] In such an environment, the Commission must adopt a single, national regime that encourages the development of IP-enabled services. As discussed in detail above,[115] the alternative is a wholly unworkable patchwork of potentially conflicting state requirements with which providers may not even be *able* to comply simultaneously, given the geographic portability of consumers and numbers in the realm of IP-enabled services.

Absent exclusive federal authority, IP-enabled services providers would have to live with the investment-sapping uncertainty created by the threat of state regulation that would negate this Commission's – and Congress's – policy of deregulating the Internet and information services. As Chairman Powell has explained, "[t]here is no greater threat to an entrepreneur, or any business, than uncertainty."[116] For that reason, the Commission properly held in the *Pulver Declaratory Ruling that* the threat of such state regulation was inconsistent with national telecommunications policy. The Commission relied on both section 230 and section 706 to determine that "*[a]ny* state attempt to impose economic or other regulations that treat FWD like a telecommunications service would impermissibly interfere with the Commission's valid federal interest in encouraging the further development of Internet applications such as these, unfettered by Federal or state regulation, and thus would be preempted."[117] The Commission should reach the same conclusion here in order to give all providers the certainty that they will not have to

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114 *NPRM* ¶ 4.

115 *See supra* Part IIIA.

116 Michael K. Powell, Chairman, FCC, Remarks at the Association for Local Telecommunications Services, Crystal City, Virginia (Nov. 30, 2001), *available at* http://www.fcc.gov/Speeches/Powell/2001/spmkp111.html.

117 *Pulver Declaratory Ruling*, 19 FCC Rcd at 3320, ¶ 19 n.70 (emphasis added).

revise their business and engineering plans to conform to multiple and conflicting state regulations.

In broadly preempting state regulation, the *Pulver* decision reiterated that the Commission's authority over information services is *exclusive* unless that service is (1) "purely intrastate" or (2) it is "practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating federal objectives for the interstate component."[118]

Neither of those conditions applies to IP-enabled services. Indeed, IP-enabled services are the furthest thing possible from purely intrastate information services. The Internet is an "international network of interconnected computers enabling millions of people to communicate with one another and to access vast amounts of information from around the world."[119] The Commission has thus held that "[m]ost Internet-bound traffic . . . is indisputably interstate in nature."[120] This reasoning applies fully to IP-enabled services, which rely on the Internet and other interstate networks. Indeed, as the Commission emphasized in the *Pulver Declaratory Ruling*, because IP addresses are portable and the "physical locations" of consumers using IP-enabled services can change, "it is evident that the capabilities [that Pulver's IP-enabled service] provides . . . are not purely intrastate."[121]

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118 *Id.* ¶ 20.

119 *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, CC Docket No. 98-79, *Memorandum Opinion and Order*, 13 FCC Rcd 22466, 22468, ¶ 5 (1998) ("*GTE Tariff Order*").

120 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 & 99-68, *Order on Remand and Report and Order*, 16 FCC Rcd 9151, 9178, ¶ 5 (2001), *remanded, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003).

121 *Pulver Declaratory Ruling*, 19 FCC Rcd at 3320, ¶ 20.

Nor is it practical to separate any interstate and intrastate components of IP-enabled services. As an initial matter, even if it were possible to determine whether particular communications were intrastate, as in *Pulver*, that could be done only by attempting to determine the physical location of users on each particular communication. Such an obligation would, at the least, be extremely costly, and would be "forcing changes on [the] service for the sake of regulation itself,"[122] a result that the Commission has properly rejected: "Tracking [Pulver's] packets to determine their geographic location would involve the installation of systems that are unrelated to providing its service to end-users. Rather, imposing such compliance costs on providers . . . would be designed simply to comply with legacy distinctions between the federal and state jurisdictions. Here, such distinctions do not serve any legitimate public policy purpose. . . . In a dynamic market such as the market for Internet applications . . . , we find that imposing this substantial burden would make little sense and would almost certainly be significant and negative for the development of new and innovative IP services and applications."[123]

Independently, even where the geographic locations of end users to particular communications are known, IP-enabled services are often provided over, and often bundled with, broadband transmission that this Commission has squarely determined is jurisdictionally interstate and subject to this Commission's jurisdiction, not the jurisdiction of state commissions. As the Commission explained in the *GTE Tariff Order*, as with other special access services over which more than 10% of the traffic is interstate, Internet access falls within this Commission's

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122 *Id.* at 3320-22, ¶¶ 21-22.

123 *Id.* at 3323, ¶ 24.

exclusive jurisdiction under the "mixed use" doctrine.[124] Indeed, the Commission explained that, because it had found that these services were subject to exclusive federal authority under the "mixed use" doctrine, it was unnecessary to determine whether state regulation was also preempted on other grounds: "In light of our finding that GTE's ADSL service is subject to federal jurisdiction under the Commission's mixed use facilities rule and properly tariffed as an interstate service, we need not reach the question of whether the inseverability doctrine applies."[125] Although the Commission determined in *Pulver* that this sort of analysis did not apply directly where the service at issue involves only "information on [a] server located on the Internet,"[126] where VoIP or another IP-enabled service is provided together with broadband transmission, the *GTE Tariff Order* establishes that such a service is subject to the Commission's exclusive jurisdiction. Offering VoIP over an interstate broadband transmission facility would not lead to fewer than 10% of the communications over that facility being interstate, nor would it make it possible to sever the interstate and intrastate communications over that facility. It would be odd indeed to conclude that broadband transmission provided by itself is subject to the Commission's exclusive authority, but that information services provided together with that transmission are not. The Commission should reject that illogical result.

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124 *See* 13 FCC Rcd at 22479, ¶ 23.

125 *Id.* at 22481, ¶ 28.

126 *Pulver Declaratory Ruling*, 19 FCC Rcd at 3321, ¶ 21.

4. The Commission Must Find That Computer Inquiry and Part 64 Cost Allocation Requirements Do Not Apply for IP-Enabled Information Services or Must Waive Those Requirements

The Commission should hold that its *Computer Inquiry* rules do not apply to IP-enabled information services offered by ILECs or, alternatively, waive those rules. It should waive its Part 64 Cost Allocation Rules for these same services in their entirety.

B. Computer Inquiry Rules Must Not Apply

ILECs are minority providers of the broadband transmission necessary to support IP-enabled information services, and the Commission has already determined that it would waive these requirements as to broadband-based information services offered by cable providers, the market leaders. If these rules are not in the public interest as applied to the market leaders, there is no rational basis to continue to apply them to secondary players. Indeed, in the broadband market, the existing asymmetrical regulation has caused, and is continuing to cause, significant *harm* to all broadband consumers in the form of artificially increased prices.

In the *Cable Modem Declaratory Ruling*, the Commission decided to exempt cable providers from *Computer Inquiry* requirements as applied to information services offered over cable broadband. In reaching that result, the Commission stressed the burdensome nature of the *Computer* requirements. As the Commission explained, among other things, these duties require "radical surgery" by forcing carriers to "extract" a telecommunications service from every information service and to subject it to the common carrier requirements of Title II.[127]

The Commission then noted that there was no public policy basis to impose such burdens. The fundamental assumption of the *Computer Inquiry* orders was that information services providers would be dependent on a *single* network to offer their services. They were

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127 *Cable Modem Declaratory Ruling,* 17 FCC Rcd at 4825, ¶ 43.

grounded in the understanding that the wireline telephone network would be the "primary, if not exclusive, means through which information service providers can gain access to their customers."[128] Indeed, *Computer II* itself stressed that the "nationwide telecommunications network" was the exclusive "building block" needed "to perform . . . information processing, data processing, process control, and other enhanced services."[129] The *Computer Inquiry* requirements were thus premised on a one-wire world that no longer exists in broadband: "[T]he one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services."[130] In sum, the "legal, technological, and market circumstances" that gave rise to the *Computer* rules are, as the Commission has explained, "very different" from those that exist in broadband today.[131]

For these and other reasons, the Commission concluded that not only did these *Computer Inquiry* requirements not apply to cable providers, but also – and more importantly for present purposes – even if they did apply, the Commission would waive them as "inconsistent with the public interest."[132] The Commission explained that imposing such a rule would discourage

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128 *Id.* ¶ 44 (internal quotation marks omitted).

129 77 F.C.C.2d at 420, ¶ 96, 423, ¶ 102.

130 *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, *Notice of Proposed Rulemaking*, 16 FCC Rcd 22745, 22748, ¶ 5 (2001).

131 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *Notice of Proposed Rulemaking*, 17 FCC Rcd 3019, 3037, ¶ 35 (2002).

132 *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825-26, ¶ 45.

facilities-based competition in both voice telephony and broadband services.[133] Such a result would "disserve the goal of Section 706 that we 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market or other regulatory methods that *remove barriers to infrastructure investment*.'"[134]

Given that the Commission has decided not to apply the *Computer* rules to the market leaders in broadband, there is no logical basis for the Commission to apply these rules to wireline IP-enabled information services – indeed, for *all* information services offered over wireline broadband transmission. The Commission should thus either determine that those rules do not apply in this context or waive them.

The Commission's own statistics show that cable remains the dominant broadband provider. According to the Commission's latest *High-Speed Services Report*, as of June 2003, cable controlled more than *two-thirds* of all high-speed lines provided to residential and small-business customers.[135] Even more recent data show that cable's lead continues to grow. In the past nine months, cable has added 3.1 million customers as opposed to 2.9 million for wireline broadband (DSL), even though wireline providers have made significant price decreases.[136] Moreover, Vonage claims that about 70% of its subscribers use cable modem for access.[137]

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133 *See Id.* at 4826, ¶¶ 46-47.

134 *Id.* ¶ 47 (internal quotation marks omitted; ellipses in original; emphasis added).

135 *See* Indus. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of June 30, 2003,* Tables 3 & 4 (Dec. 2003) (over 200 kbps in at least one direction: 13.7 million cable modem lines, 6.4 million ADSL lines, over 200 kbps in both directions: 11.9 million cable modem lines, 2.1 million ADSL lines).

136 Fact Report at A-1 & Table 1.

137 *See* T. Hearn, *Sinking VoIP Costs Cheer Op Execs*, Multichannel News (Feb. 16, 2004).

There is also emerging broadband competition in the mass market from other alternatives, including fixed wireless and broadband over power lines.[138] And in the enterprise market, it is AT&T and other large IXCs that have the lion's share of the business broadband market. As of January 2004, AT&T, MCI, and Sprint controlled 79% of the frame relay market and 60% of the ATM market.[139]

The ILECs thus do not even arguably have "bottleneck" control of the transmission facilities necessary to offer IP-enabled information services, or, for that matter, any other information services offered over broadband facilities. Accordingly, there is simply no competitive justification to continue to impose these obligations, particularly in light of the Commission's square holding that the market leading cable providers should not be burdened with these duties.

Equally important, those rules impose enormous needless costs on ILECs and thus ultimately on consumers of both ILEC and cable broadband services. In fact, BellSouth has provided the Commission with detailed evidence showing that it costs more than *$3.50* per broadband customer per month to adhere to the *Computer Inquiry* rules and related requirements.[140] That means both that BellSouth must charge significantly more to its customers every month to recoup these costs, and that BellSouth cannot exert as significant pricing pressure on cable and other broadband providers as they otherwise would. The rates for all forms of broadband service are thus artificially inflated by these regulatory costs, causing significant harm

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138 *See* Fact Report at A-8 – A-19.

139 *See id.* at A-19.

140 *See* Letter from L. Barbee Ponder, IV, BellSouth, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-33, *et al.* (Aug. 11, 2003).

to consumers and the public interest. In turn, the adoption of IP-enabled services that depend on broadband transmission is slowed, contrary to the policy priorities of Congress and this Commission.

In sum, at least as strongly as in the *Cable Modem Declaratory Ruling*, the public interest demands that the Commission waive its *Computer* rules for wireline broadband transmission used to provide IP-enabled information services. Indeed, that relief is long overdue and should be applied to all wireline broadband transmission used to provide information services.

C. The Commission Must Waive Part 64 Cost Allocation Rules

Part 64 cost allocation rules [141] pose the same sort of unnecessary regulatory burdens as do the *Computer Inquiry* requirements and should be waived. Requiring ILECs to allocate costs pursuant to Part 64 for any IP-enabled service deemed to be an information service places ILECs at burdensome regulatory odds with other providers of the same service, particularly cable operators.

Part 64 was an outgrowth of the *Computer Inquiry* proceedings. If a company elected to provide enhanced services through an integrated operation, as opposed to a separate affiliate, the Commission believed there was a potential risk that the ILEC could subsidize the non-regulated operations with the regulated operations. This risk, however, was identified at a time when ILECs were subject to rate-of-return (also referred to as cost-plus) regulation for customer rates. The identified risk was the concern that costs from the non-regulated operations would be included as costs for the regulated operations thereby having a twofold effect. First, the regulated ratepayers' rates potentially could be improperly increased because they could include some non-regulated service costs. Second, non-regulated services, which are competitive, could

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[141] 47 C.F.R. § 64.900 *et seq.*

receive a subsidy by having part of their costs passed on to regulated services. The Commission feared that if this occurred, ILECs would be able to offer their non-regulated services at below cost because part of the cost would be picked up by the non-competitive regulated services. [142] To alleviate this problem, the Commission promulgated the Part 64 cost allocation rules. These rules require ILECs to allocate investment and operations costs between regulated and non-regulated accounts by direct assignment, when possible. All costs that cannot be directly assigned are grouped into pools and allocated pursuant to a hierarchy or allocation methods. Thus, Part 64 places an extraordinary burden on ILECs to maintain extensive and tedious accounting records. In addition, the ILECs must obtain an independent audit of Part 64 records every two years.

The Commission should waive Part 64 cost allocation rules for IP-enabled information services. Part 64 is a vestigial relic. Every ILEC subject to Part 64 is no longer under rate-of-return regulation for federal ratemaking purposes. In 1990, the Commission adopted incentive, or price cap, regulation for ILECs. [143] Unlike rate of return regulation, with price cap regulation increases in costs do not translate into increased prices charged to customers for regulated services. [144] Indeed, the purpose of price cap regulation was to adopt an incentive-based pricing

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142 *In the Matter of Separation of costs of regulated telephone service from costs of nonregulated activities; Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to provide for nonregulated activities and to provide for transactions between telephone companies and their affiliates*, CC Docket No. 86-111, *Report and Order*, 2 FCC Rcd 1298 (1987).

143 *In the Matter of Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, *Second Report and Order*, 5 FCC Rcd 6786 (1990).

144 *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards* , CC Docket No. 90-623, *Report and Order*, 6 FCC Rcd 7571, 7596, ¶ 55 (1991), *California v. FCC,* 39 F.3d 919 (9th Cir. 1994), *cert denied*, 514 U.S. 1050 (1995); *see also, California v. FCC*, 39 F.3d at 926-27; *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Circuit), *cert denied*, 510 U.S. 984 (1993) ("[price cap regulation]

theory that promoted ILEC efficiencies as opposed to cost-plus pricing. For price cap ILECs, rates are driven by changes in the price cap formula, which incorporates changes in inflation and other non-accounting factors, such as demand changes. The price cap system was intentionally designed to prevent cross-subsidy between services. Thus, price cap regulation obviates the need for Part 64 cost allocation and it should be eliminated.

The Commission's goal must be to ensure that one provider of IP-enabled services is not disadvantaged from another. This requires ILECs to be free from the archaic accounting rules in the provision of IP-enabled services. No other provider of these services has to engage in the cost allocation of their networks between regulated and non-regulated. The Commission should therefore free ILECs from Part 64 allocation obligations for IP-enabled information services.

1. The Commission Should Apply Interstate Access Charges Equally to All Services, Including IP-Enabled Services, That Use the PSTN

The Commission's *NPRM* identifies the core insight that is central to a proper carrier compensation regime for IP-enabled services: "As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways."[145]

That conclusion is correct. To the extent that IP-enabled services, such as the one offered by Pulver, do not use the PSTN, there is no reason for them to pay to support the costs of the

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reduces any BOC's ability to shift costs from unregulated to regulated activities, because the increase in costs for the regulated activity does not automatically cause an increase in the legal rate ceiling.").

[145] *NPRM* ¶ 61.

PSTN. On the other hand, if those services *do* use the PSTN and require a LEC to use its switches and other facilities to terminate a call that starts on an IP network (or to originate a call that is then handed over to an IP network), the LEC should be compensated through access charges (or any future mechanism) just as it is compensated for performing the same functions to originate or terminate other interstate communications. It begs common sense to believe that IP-enabled information service providers will not continue to use the PSTN the same way as other interstate communications providers; if the PSTN were not equitably supported and available for VoIP customers to reach other customers, the value proposition of VoIP service would readily disappear. LECs, then, have a right to recover the legitimate costs imposed on their network in originating and termination interstate communications.[146] A PSTN-interconnecting service provider's use or substitution of IP technology does nothing to change the nature of that interconnecting provider's use of an ILEC network. A government mandate or policy that allows some carriers to avoid access charges because of the technology they use would therefore deprive LECs of the use of, and appropriate compensation for, their property.

Moreover, any other result would lead to providers using IP technology not because it is more efficient or offers more value to customers but simply because, by using that particular technology, they could avoid paying for the costs they impose on the PSTN. As the Commission properly explained in a related context, if the Commission exempted IP-based communications from access charges, it would be creating "artificial incentives for carriers to convert to IP networks. Rather than convert at a pace commensurate with the capability to provide enhanced functionality, carriers would convert to IP networks merely to take advantage of the cost

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146 *See, e.g., Access Charge Reform, et al.*, CC Docket Nos. 96-262, *et al.*, *Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45*, 15 FCC Rcd 12962, 13015, ¶ 130 (2000).

advantage [of avoiding access charges] . . . . IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid paying access charges."[147] BellSouth fully agrees with that analysis, which applies equally here. The Commission has more than ample authority to impose an even-handed regime that avoids such competitive distortions and that does not impose a discriminatory share of PSTN costs on Title II telecommunications services. Title I charges the Commission with ensuring "rapid, efficient, Nation-wide wire and radio communications services with adequate facilities at reasonable charges."[148] It is surely part of the Commission's duty of ensuring "adequate" facilities at "reasonable" charges to create rules that require all providers that use the facilities in the same way to help defray the costs of those facilities and thus not to impose those costs, unreasonably, on only a subset of carriers.

Indeed, because the issue here involves insuring even-handed treatment of services that might fit in different regulatory categories (telecommunications services and information services) but are alike in relevant respects, prior precedent supports the Commission's authority. Of particular relevance, the Supreme Court affirmed the Commission's judgment that it was appropriate under Title I to regulate cable in a manner that preserved the viability of local television broadcasting with which cable was competing. As the Court explained, the limits that the Commission placed on cable were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[149] The

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147 *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges,* WC Docket No. 02-361, *Order*, FCC 04-97, ¶ 18 (rel. Apr. 21, 2004),

148 47 U.S.C. § 151 (emphasis added).

149 *Southwestern Cable*, 392 U.S. at 178.

same analysis applies here, where the Commission has unquestioned authority over telecommunications services under Title II, and it is reasonably ancillary to that authority to ensure that other services that use the PSTN in the same manner as those services bear the same costs as do those telecommunications services.

Indeed, the Commission's decisions that provided enhanced service providers ("ESPs") with a limited exemption from the ordinary forms of access charges that would otherwise apply to them when calls are originated on the PSTN demonstrate the Commission's longstanding understanding that it has the authority to require information service providers to pay access charges.[150] The Commission's decisions make plain that "enhanced service providers" are among the users of "access services."[151] The Commission subsequently decided to provide a limited exemption to those providers from some access charges, a decision that necessarily implies that the Commission was waiving rules that would otherwise apply and necessarily shows that the Commission is empowered to require these providers to pay these charges.[152]

Moreover, the Commission subsequently made plain that it was continuing this narrow exemption because it believed that ESPs were using the PSTN in a manner different than IXCs, the traditional payers of access charges, and in fact were more like business users of the

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150 ESPs have never been completely exempt from access charges, although the current generation of information service providers have sought to "expand" the limited ESP exemption to cover types of interstate services it was never intended to cover. *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266, BellSouth Reply at 3-8, Reply Comments of SBC Communications at 4-13, Reply Comments of the Verizon Telephone Companies at 4-7 (filed Mar. 31, 2004).

151 *MTS and WATS Market Structure,* CC Docket No. 78-72 Phase I, *Memorandum Opinion and Order*, 97 F.C.C.2d 682, 711, ¶ 78 (1983).

152 *See, e.g., Access Charge et al.,* CC Docket Nos. 96-262, *et al., Reform, First Report and Order*, 12 FCC Rcd 15982, 16132-33, ¶ 343 (1997) ("*Access Charge Reform Order*").

telephone network.[153] The Eighth Circuit agreed with that analysis, and expressly based its affirmance of the Commission on the conclusion that ISPs "do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges."[154] As the *NPRM* itself explains, that logic does not apply in circumstances where IP-enabled service providers do use local circuit-switched networks in precisely the same way as traditional IXCs do. In those circumstances, the "cost of the PSTN should be borne equitably among those that use it in similar ways."[155]

Finally, that result is not only sound policy; it is the Commission's legal duty. Indeed, when in the past the Commission has lost sight of the core principle that like services should be treated alike, the courts have intervened. To chose just one example, when the Commission sought to regulate PCS services differently from cellular services, the Sixth Circuit reversed it, explaining that "if [PCS] and Cellular . . . are expected to compete for customers on price, quality, and services, what difference between the two services justifies keeping the structural separation rule intact for Bell Cellular providers?"[156] Because the Commission provided "no answer to this question, other than its raw assertion that the two industries are different," its decision could not be sustained.[157] Just so here, where IP-enabled services are competing against traditional interexchange offerings and, in many instances, using the PSTN in the same way to

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153 *See id.* at 16133, ¶ 345.

154 *Southwestern Bell Tel Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

155 *NPRM* ¶ 61.

156 *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995) (citation omitted).

157 *Id.*; *see also GTE Midwest, Inc. v. FCC*, 233 F.3d 341, 343 (6th Cir. 2000) (affirming Commission decision on remand from *Cincinnati Bell* to impose separate affiliate requirements on *all* local telephone companies providing *any* kind of commercial mobile radio service).

do so. Both law and policy require that all users of the PSTN pay the same interstate rates when they use the PSTN for the same interstate services, regardless of service technology.

2. All IP-Enabled Service Providers Should Have Identical Universal Service Funding Obligations

As the Commission has explained, contribution policies should "reduce[] the possibility that carriers with universal service obligations will compete directly with carriers without such obligations."[158] Consistent with that insight, providers of IP-enabled services, whether data or voice, should have the same universal service obligations as interstate carriers that use circuit switched technologies. Any other result would both disadvantage one set of providers because of the technology they use and reduce support for universal service as more and more consumers switch to IP-based services.

Those results are contrary to the Communications Act, which requires "sufficient," "predictable," and "nondiscriminatory" mechanisms to support universal service.[159] They are equally inconsistent with the Commission's own prior determinations that universal service mechanisms should be technologically neutral, in order to allow the "marketplace to direct the advancement of technology and all citizens to benefit from such development."[160]

The Commission has explicit statutory authority to extend universal service obligations to IP-enabled information services. Section 254(d) authorizes the Commission to require all providers of interstate "telecommunications" to "contribute to the preservation and advancement of universal service" if the "public interest so requires." Because "information services" are, by

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158 *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, 12 FCC Rcd 8776, 9183-84, ¶ 795 (1997) ("*First Universal Service Order*").

159 47 U.S.C. § 254(b)(5), (d).

160 *First Universal Service Order* 12 FCC Rcd at 8802, ¶ 49.

statutory definition, provided "via telecommunications,"[161] underlying every interstate information service is an interstate "telecommunications" sufficient to trigger section 254(d). The Commission should therefore require IP-enabled Information service providers to contribute to the Universal Service Fund when their service originates or terminates calls on the PSTN.

There is an exceedingly strong public interest both in adequate universal service contributions and in ensuring that technologies that compete against each other bear the same universal-service burdens. In the Commission's words, "the public interest *requires* that, to the extent possible, carriers with universal service contribution obligations should not be at a competitive disadvantage in relation to [other] providers on the basis that they do not have such obligations."[162] That correct insight requires the Commission to apply the same universal-service duties to IP-based services that use the PSTN as it imposes on their competitors that use more traditional technologies.

3. The Commission Should Adopt Other Regulations as Necessary to Protect E911 and Other Social Interests

An IP-enabled information service that (1) includes a voice capability component and (2) is either (a) assigned a NANP telephone number or (b) can call a line assigned to a NANP telephone number and (3) either (a) originates or terminates or both originates and terminates calls on the PSTN or (b) is a substitute for traditional voice communications, should comply with E911 requirements that are economically and technically reasonably achievable given the nature of the technology and the associated costs. The Commission can and should require IP-enabled service providers that meet the foregoing test to fulfill 911 emergency call processing

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161 47 U.S.C. §153(20).

162 *Report to Congress,* 13 FCC Rcd at 11565, ¶ 133 (emphasis added).

requirements in a manner that is not unnecessarily disruptive of the overall market development of IP-enabled services. The Commission should therefore allow the industry to develop reasonable solutions for accomplishing E911 requirements through the adoption of open and voluntary industry standards prior to imposing any government mandated standards.[163]

The National Emergency Numbering Association ("NENA") has been addressing, with industry participation, various proposals for "migratory paths" for IP-enabled (specifically VoIP) services. The technical output of these NENA committee findings will likely be provided to the Emergency Services Interconnection Forum ("ESIF") in order that the ESIF may take steps necessary to create potential American National Standard Institute ("ANSI")-accredited standards. NENA's VoIP/Packet Technical Committee is defining the E911 requirements that will need to be met by VoIP technology-based voice communications providers, as well as ways to meet those requirements. If ESIF and NENA determine that an ANSI standard, or some other similar industry standard, is required to improve the likelihood of adoption of NENA's work, ESIF will champion the effort to create such standards documents.[164]

BellSouth strongly encourages the Commission to look to NENA for guidance on leading the industry toward technical and operational solutions and standards that would enable VoIP and IP-enabled services to move forward in manageable stages. NENA's VoIP/Packet Technical Committee Working Group – Migratory Definitions Working Group is currently addressing short-term proposals through industry participation in order to develop appropriate industry

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[163] E911 requirements may be required immediately for any "stationary" IP-enabled information services for which there are few, if any, technical barriers. However, E911 call processing needs for portable or mobile IP-enabled Information services should be addressed in a phased or transitional approach that takes into account the legacy systems of LECs' existing E911 networks.

[164] BellSouth participates actively in NENA and ESIF.

standards. BellSouth does not believe that the promulgation of "best practices" for IP-enabled services can be effectively established before the technical solutions to a well-defined set of requirements are identified.

In order to facilitate progress toward ultimate adoption of IP-enabled services E911 solutions, the Commission could sanction a set of best practices. This could be accomplished through the Network Reliability & Interoperability Council ("NRIC")-7 Focus Group 1, Subcommittees 1A and/or 1B, that are chartered by the FCC, when those groups are able to review NENA's final recommendations on the subject.[165] In sum, while the Commission should, under the circumstances outlined above, establish E911 rules for appropriate IP-enabled services, the FCC should not mandate rules that do not fully consider the NENA findings and recommendations.

The natural evolution of VoIP and IP-enabled services will lead to technological improvements and cost savings in the transmission of emergency services. However there will be a cost to service providers and the public safety entities in planning for further implementation of E911 services. For example, IP-enabled services are capable of complying with the Commission's basic E911 requirements when the IP-enabled services end user is at a stationary location where the service was initially installed, such that calls can be sent to the appropriate PSAP (Public Safety Answering Point) locations. However, when an IP-enabled service end user is not stationary and a 911 call is being placed from a location other than where the service was initially installed, the 911 calls cannot be delivered to the appropriate PSAP location without the IP-enabled service provider taking additional steps to make the service

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[165] BellSouth is significantly involved in NRIC-7 Focus Groups and subcommittees including those related to E911 matters.

capable of doing so. At a minimum, those steps involve the ability of the originating VoIP network to obtain selective routing information for the call, or to at least forward it into an E911 Service System Provider network where such selective routing can occur.

For public safety entities, in the short term, there will be ways for a PSAP to receive an E911 call from a VoIP end user without the need for the PSAP to retrofit its CPE to any great extent. There could be automatic location information ("ALI") database related costs to the PSAP if VoIP calls are determined to require new ALI response formats. BellSouth does not anticipate such costs in the short term, because most short term "solutions" seem to be aimed at extending the use of existing wireless oriented infrastructure and data delivery techniques. However in the long run, in order for PSAPs to reap the new capabilities that VoIP can provide, they will need to retrofit their existing CPE to be IP-capable, or at least IP-interoperable. Therefore funding of E911 services will be an issue of concern to the industry as the services move forward. The FCC should address the funding issues that VoIP and IP-enabled services will generate and where the responsibilities for those costs reside. Current 911 surcharge structures that are in place today are not likely to be effective long into the future to cover these costs.

With respect to CALEA requirements, the Commission has established a notice and comment proceeding initiated by a petition filed by the Department of Justice.[166] BellSouth has filed comments in that proceeding, setting forth its specific CALEA positions, and to the extent necessary, incorporates that pleading here.[167] The Commission and the Federal Bureau of

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166 *Comment Sought on CALEA Petition for Rulemaking*, RM-10865, *Public Notice*, DA 04-700 (rel. Mar. 12, 2004).

167 *United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration Joint Petition for Rulemaking to Resolve Various Outstanding*

Investigation should implement CALEA in a manner consistent with BellSouth's pleadings in that proceeding.

The Act also enshrines Congress's public policy objective of requiring manufactures of "telecommunications equipment" (in addition to providers of telecommunications services) to ensure that such equipment is designed to be usable by individuals with disabilities, if readily achievable.[168] Since all IP-enabled information services are defined by federal statute as having a "telecommunications" transmission component, manufacturers of IP information services equipment are already obligated to comply with such requirement since such equipment provides "telecommunications."

Finally, with respect to IP-enabled service provider access to NANP telephone numbers, the Commission should be cognizant that some increased use of telephone numbers could accelerate telephone number exhaust. The Commission will therefore need to examine whether current telephone number utilization and forecasting requirements will remain adequate in an IP-enabled services environment, and whether IP-enabled service providers should be able to obtain NANP resources directly from either the North American Numbering Plan Administrator ("NANPA") or the appropriate Number Pooling Administrator. BellSouth does not believe the record indicates any need to change current numbering assignment procedures or administrative practices, but believes that the Commission should direct the industry to examine the issue through the North American Numbering Council and the Industry Numbering Committee. IP-

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Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act, RM-10865, Comments of BellSouth Corporation (filed Apr. 12, 2004).

168 47 U.S.C. § 255.

enabled service providers may, in the meantime, obtain NANP resources either by becoming certificated as a carrier, or by partnering with a certificated carrier.

D. Proper Regulatory Treatment of IP-Enabled Telecommunications Services: A Preemptive Federal Policy of No Economic Regulation, Compensation for PSTN Access, Contributions to Universal Service and Minimally Intrusive Social Policy Regulation

There are now and may continue to be in the future IP-enabled services that are properly "classified" as telecommunications services under existing law, particularly some forms of VoIP services that interconnect with the PSTN as well as those that use and terminate calls to North American Numbering Plan telephone numbers.

1. Some IP-Enabled Services May Qualify as Telecommunications Services

The Telecommunications Act defines a telecommunications service as "the offering of telecommunications (defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received") for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used."[169]

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[169] 47 U.S.C. §§ 153(43), (46). In the *AT&T Declaratory Ruling*, the Commission determined that where (1) AT&T routed a portion of its interexchange voice traffic over its own Internet backbone, (2) where the TDMA to IP/IP to TDMA protocol conversions took place exclusively on its backbone, and (3) where the record did not indicate that the specific service contained any current indicia of an "information service" as defined by statute, the protocol conversions associated with AT&T's specific service are "internetworking" conversions, which the Commission has found to be "telecommunications services" under existing law, and therefore the specific service is a telecommunications service. The Commission rejected arguments that the specific service presented in the record is an information service due to its "future potential to provide enhanced functionality and net protocol conversion" as well as arguments that "VoIP services that today have characteristics of telecommunications services may evolve into integrated voice, data and enhanced services platforms." *AT&T Declaratory Ruling* ¶¶ 11, 12. The Commission's regulatory classification analysis was correctly decided under existing law based on the specific record compiled in the AT&T proceeding, and without prejudicing the Commission's ability to adopt a fundamentally different approach in the resolution of this proceeding or the *Intercarrier Compensation* proceeding. *Id.* ¶ 13. Under the

Some IP-enabled services may meet this definition. As an example, telecommunications service providers including BellSouth have been rethinking both legacy digital Centrex[170] and PBX strategies in light of potential benefits of IP-based Centrex services. BellSouth, in fact, provides "BellSouth Centrex IP Service" and is in the process of adding "BellSouth Enhanced Business Service Interface to BellSouth Centrex IP" to its product suite. BellSouth Centrex IP is a service arrangement that provides BellSouth Centrex service to the subscriber in the IP signaling format using components of an IP service platform and a broadband access facility, Fast Packet Transport®, to carry packetized voice streams for many simultaneous calls. The service enables customers to use VoIP handsets in lieu of standard Centrex handsets, although both standard Centrex and VoIP stations will continue to operate in the same way that Centrex stations do. Although this service introduces and uses new VoIP technology in BellSouth's network on an incremental basis to provide existing Centrex service, and from the customer's point of view, involves a net protocol conversion and IP-based CPE, the net protocol conversion is subject to an existing FCC policy exception to classifying protocol processing or conversion as an information service: as a net protocol conversion necessitated by the introduction of a new telecommunications service technology on a piecemeal basis. Thus, the precise service

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definition of IP-enabled services that BellSouth offers in these comments, the service arrangement would still not qualify as an "IP-enabled service" because no part of the service "is originated or terminated by the customer in the Internet protocol (IP) over an IP platform." Nevertheless, if the Commission were to adopt a less rigorous definition that would allow AT&T's service arrangement to be treated as an "IP-Enabled" rather than a "Plain Old" telecommunications service, AT&T's service arrangement would and should be subject to minimal economic regulation but obligated to pay appropriate PSTN access charges, obligated to support universal service funding, and to support 911, CALEA, disabilities access and TRS requirements.

[170] Centrex can be considered as providing virtual PBX services, with multiple customers and many sites being served by the software that resides in one Central Office system. Abrahams & Lollo, Centrex or PBX: The Impact of IP (Artech 2003) at 4.

arrangement described above is properly classified as IP-enabled telecommunications services under existing law.

2. These Telecommunications Services Are Subject to This Commission's Jurisdiction Under Title II

IP-enabled telecommunications services are subject to the Commission's jurisdiction under Title II of the Act. As the Commission explains, services offering transmission capacity for the delivery of information without net change in form or content were historically subjected to common carrier regulation under Title II of the Communications Act of 1934.[171] The 1996 Act essentially codified, with minor modifications, the foregoing description of regulated "basic" service as "telecommunications."[172] Thus, absent appropriate Commission action, to the extent that service providers deploy IP-enabled services provisioned as telecommunications services, they would be potentially subject to legacy economic regulation under Title II whose rationale, as demonstrated above, cannot be applied to the competitive markets for IP-enabled services and broadband Internet access services without introducing severe distortions into the market and slowing economic growth. Fortunately, as the Commission notes, Congress has provided the Commission with a host of statutory tools that together accord the Commission discretion in structuring an appropriate approach to IP-enabled services, including the requirement to forbear from applying a particular regulation or statutory provision.[173] The Commission should assert exclusive jurisdiction over IP-enabled telecommunications services and use its forbearance

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171 *NPRM* ¶ 25.

172 *Id.* ¶ 26.

173 *Id.* ¶¶ 45, 46.

authority under Title II to craft an even-handed regime and avoid the disparate treatment of competing technologies that might otherwise accompany the legacy classification.

3. The Commission Should Establish That It Has Exclusive Jurisdiction over IP-Enabled Telecommunications Services and Thus Preempt Disruptive and Unnecessary State Regulation

Telecommunications services have long been subject to dual state and federal regulation, and the Commission has preempted state regulation in matters touching this area in very limited circumstances, such as inside wire detariffing, customer premises equipment ("CPE") and special access. IP-enabled telecommunications services are perhaps the most recent example of a limited circumstance in which the Commission should announce preemptive deregulatory policies in order to prevent inconsistent state regulation of an innovative service that will otherwise help fuel the engine of economic growth and recovery in the domestic telecommunications sector.

The Commission may preempt state regulation either when a matter is entirely interstate or when: "(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation 'would negate[] the exercise by the FCC of its own lawful authority' because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects."[174] The Commission may also preempt purely intrastate regulation if the state regulation cannot feasibly coexist with the federal regulation.[175]

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174 *PSC of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (citations omitted).

175 *California v. FCC*, 39 F.3d 919 (9th Cir. 1994).

The facts underlying current and future IP-enabled telecommunications services support the Commission's assuming exclusive jurisdictions under the cited authorities. IP-enabled technology allows assignment of both traditional NANP telephone numbers as well as IP addresses to IP-enabled telecommunication service calling devices and CPE that are, in turn, inherently mobile. As a fundamental matter, then, it is simply not reasonable, practical, or even logical to assume that the origination and termination points of any voice or data communication will remain fixed or static, whether over the life of a particular IP-enabled telecommunications service or even from one call to the next.

Further, because IP-enabled telecommunications services are based on the same common protocol that supports the Internet, the world wide web and all Internet service applications, VoIP and other IP-enabled CPE devices can connect to and interact with all other Internet services that are presumptively interstate in nature, and that interaction and interoperability is a critically important feature and technical capability of IP-enabled telecommunications services from the customer's perspective. As shown in section IV.A.3, packet-based Internet communications, regardless of their legacy regulatory classifications, "defy jurisdictional boundaries" because packets are "routed across a global network with multiple access points."[176] Thus, at the very, least a substantial portion of IP-enabled telecommunications service traffic will necessarily be interstate, and not readily or reliably (non-arbitrarily) allocable to the intrastate and interstate jurisdictions. The Commission has asserted preemptive jurisdictional authority in

176 *NPRM* ¶ 4.

similar circumstances in the context of the *Cable Modem Declaratory Ruling*,[177] DSL service,[178] and in the special access arena.[179] It should do so here.

The Commission must adopt a single national regime that encourages the development of IP-enabled services regardless of whether they are, or more closely resemble, information services, or whether they are, or more closely resemble, traditional telecommunications services, or whether they are a combination of both types of services. The Commission should do so even if it is now or may become feasible to track IP-enabled telecommunications service data packets in order to determine their geographic location,[180] and despite the superficial and simplistic appeal of adopting an arbitrary surrogate in order to pretend that jurisdictional separations are practical, let alone possible.

4. The Commission Should Forbear from Application of Title II Legacy Regulation to IP-Enabled Telecommunications Services and Declare BellSouth to Be Non-Dominant in the Provision of IP-Enabled Services

The Commission should use all of its available authority to refrain from imposition of legacy Title II economic regulation to the IP-enabled telecommunications services. It is critical that competing IP-enabled service providers already or potentially or even arguably subject to

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177 *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4832, ¶ 59, *vacated on other grounds*, *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

178 *GTE Tariff Order*, 13 FCC Rcd at 22466, ¶ 1.

179 *See, e.g.*, 47 C.F.R. § 36.154(a).

180 Even where the geographic locations of end users to particular communications are known, IP-enabled services that replace traditional voice services are provided over, and often bundled with, broadband transmission that this Commission has squarely determined is jurisdictionally *interstate* and subject to this Commission's jurisdiction, *not* the jurisdiction of state commissions.

Title II obligations because of their provisioning of IP-enabled telecommunications services have the regulatory certainty that will promote investment and development in these services.[181]

The public interest would be served by a uniform national policy that would result from such an exercise regulatory restraint.[182] As SBC explains, "no single entity or class of entities dominates the provision of IP platform services, and because multiple vendors specialize in providing facilities, software, or services, the market for IP platform services operates well without regulation."[183] Because of this, as SBC goes on to explain, "Title II regulation would distort the workings of these market forces by imposing new costs on some participants but not others, interfering with the cooperative business relationships of the various market participants, and discouraging some types of new entrants from taking advantage of the openness of IP platforms to enter or offer new and diverse services."[184]

Such regulatory restraint is completely consistent with the statutory requirements for forbearance. First, as SBC demonstrates, Title II regulation of IP platform services is "decidedly inconsistent with – and in fact, affirmatively harmful to – the public interest."[185] These obligations are inconsistent with public interest because "no single entity or class of entities dominates the provision of IP platform services, and because multiple vendors specialize

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181 SBC Forbearance Petition at 2; *Pulver Declaratory Ruling*, 19 FCC Rcd at 3307, ¶ 1 (in declaring pulver.com's Free World Dialup service to be an unregulated service subject to its jurisdiction, the Commission's action served to "remove any regulatory uncertainty that ha[d] surrounded Internet applications such as FWD.").

182 SBC Declaratory Ruling Petition. In the *Cable Modem Declaratory Ruling*, the Commission tentatively concluded that Title II regulation would not be appropriate for cable modem service and that it should forbear. 17 FCC Rcd at 4832, n.219.

183 SBC Forbearance Petition at 5.

184 *Id.* at 2.

185 SBC Forbearance Petition at 5.

in providing facilities, software or services" such that "the market for IP platform services [already] operates well without regulation."[186] Because the Commission has determined that competition eliminates the need for continued regulation, that regulation can distort the functioning of the market place, and that the potential for regulation to create and maintain distortions in investment decision should be minimized,[187] it is clearly inconsistent with the public interest to maintain the panoply of Title II regulation should that Title apply to any IP-enabled service offering or platform.

For similar reasons, application of legacy Title II economic regulation to IP-enabled services and platforms is harmful to the public interest as well. Legacy Title II economic regulation will only serve to inhibit entry, investment, and participation in the marketplace, whether through the provision of IP-enabled information services, currently subject to stifling *Computer Inquiry* rules,[188] or IP-enabled telecommunications services, if the Commission were to carry forward legacy economic regulation.

Nor, as SBC demonstrates, is Title II regulation of IP platform services necessary to protect consumers.[189] Because no single provider is dominant in the IP-enabled services marketplace, the competitive market is the superior mechanism for protecting consumers from unreasonable pricing.[190] There is thus no need for economic regulation.[191] At the same time,

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186 *Id.*

187 *Id.* at 5-6; *Access Charge Reform Order,* 12 FCC Rcd at 16107, ¶ 289, 16326. ¶ 263.

188 The *Computer Inquiry* rules would not, of course, apply to a telecommunications service and therefore should not apply to an "IP-enabled" telecommunications service.

189 SBC Forbearance Petition at 10-11.

190 *Id.* at 10, quoting *Access Charge Reform Order,* ¶ 263.

social policy regulation designed to protect public safety and universal service and promote accessibility should be retained and applied even-handedly to all providers of competing services.

Finally, SBC demonstrates that Title II regulation of IP platform services is not necessary to ensure that charges and practices in connection with such services are just and reasonable and not unjustly or unreasonably discriminatory.[192] Pressures in the highly competitive market for IP platform services will continue to ensure the reasonableness of market rates.

Based on the record in this and related proceedings, the Commission should declare BellSouth to be non-dominant in the provision of IP-enabled services. Neither BellSouth, nor any other ILEC, has "the ability to raise and maintain prices above the competitive level" without sacrificing market share.[193] These firms do not have dominant market power in the IP-enabled services market, as the *NPRM* makes clear and as the record in this proceeding will establish. Nor, as demonstrated in the *Fact Report* as well as the records of the Commission's various broadband related proceedings, do the BOCs have dominant market share in the provision of broadband Internet access; that role, if there is one, belongs to the cable operators.[194] All of the facts and rationale set forth in section III.B. above demonstrate conclusively that BellSouth and other BOCs are non-dominant in the relevant markets, and this Commission should so declare.

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191 Commissioner Kathleen Abernathy, Consumer Protection 2003: A Primer for Telecom Companies, Davis Wright Tremaine, 2003 FCC LEXIS 3540, at *2 (June 24, 2003); *Access Charge Reform Order,* 12 FCC Rcd at 16174 (Commissioner Susan Ness concurring).

192 SBC Forbearance Petition at 11-12.

193 47 C.F.R. § 61.3(q).

194 As shown earlier, cable modem service competes with BellSouth's DSL service in 94 percent of the relevant MSAs.

5. Network Use and Access Requirements, USF Funding Requirements, CALEA, E911, Disabilities Access and TRS Obligations Already Apply to IP-Enabled Telecommunications Services But Should be Minimally Intrusive on All Carriers

The Commission has already been given specific authority to require telecommunications service providers to participate in the current system of access charges, to contribute to the universal service fund based a percentage of their interstate revenues, and to comply with law enforcement and public safety assistant requirements, as well as disabilities access requirements. The Commission need not forbear from enforcing these requirements, but rather require, as demonstrated above, that certain types of IP-enabled information service arrangements be subject to similar requirements under the Commission's Title I Authority. For both types of providers however, all such requirements should be as minimally intrusive as possible.

CONCLUSION

For the foregoing reasons, the Commission should establish a deregulatory and market-based national policy that treats all providers of equivalent IP-enabled services the same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 28th day of May served the parties of record to this action with a copy of the foregoing **COMMENTS** by electronic filing addressed to the parties listed below.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
Petition of SBC Communications Inc	)	WC Docket No. 04-29
For Forbearance from the Application of	)	
Title II Common Carrier Regulation to	)	
IP Platform Services	)	

REPLY COMMENTS

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Title II Common Carrier Regulation to	)	
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REPLY COMMENTS

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), replies to the comments filed in this proceeding.

I. INTRODUCTION AND SUMMARY

The comments show widespread agreement on the enormous potential of IP-enabled services to bring new, valuable, and efficient services to consumers, and on the need for a single, unified federal approach in order to sustain their continuing deployment. There is also widespread agreement that economic regulation is generally inappropriate for these new services, which are offered by numerous competitors over a host of intermodal platforms.[1] The dispute is really about whether a subset of IP providers – those that own broadband facilities – should be saddled with legacy economic regulation, even as they attempt to offer services in competition with the larger subset of IP providers who, the argument goes, should be free from all such regulatory oversight while at the same time receiving government mandated access to their

[1] *See, e.g.*, Verizon Comments at 5-29; AT&T Comments at 15; CTIA – The Wireless Association™ ("CTIA") Comments at 8-9; Level 3 Communications LLC ("Level 3") Comments at 25-27; New Jersey Division of the Ratepayer Advocate ("NJDRA") Comments at 8; Arizona Corporation Commission ("ACC") Comments at 12-13; United States Telecom Association ("USTA") Comments at 22-25; BellSouth Comments at 14-23.

competitors' facilities. The parties that argue for such market-distorting regulation – as exemplified by MCI's "layers" model – ignore this Commission's repeated findings that broadband transmission is competitive now, and likely to get even more competitive in the future.

In light of this competition, the Commission should assume its proper leadership role and reject demands to perpetuate or impose new economic regulation on providers of IP-enabled services at any level. In order to create a level playing field for all these providers, the Commission should use the "host of statutory tools" provided by Congress to structure a unified approach to IP-enabled services, which the Commission should define to include "any voice, data, video or other form of communication service provided by any type of communications provider (including telephone companies, cable companies, wireless providers, satellite companies, power line companies, ISPs, or any other type of entity) whereby some part of such service is originated or terminated by the customer in the Internet protocol and transported over an IP platform."[2] This unified approach should ensure that all providers of similar IP-enabled services would be treated alike regardless of who provides those services and whether the services qualify as information services or telecommunications services.

In light of proliferating applications, increased demand for Internet access, and augmented network capacity deployed across multiple broadband services platforms, including those of LECs, cable operators, direct broadcast satellite providers ("DBS"), video programming providers, wireless (including WiFi and CMRS) providers, and electric companies using power

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[2] BellSouth Comments at 7.

lines, the Commission should decline to impose economic regulation on these services and further declare BOCs to be non-dominant in the provision of these services.

On the other hand, the Commission can and should take appropriate action to ensure that Congress's public interest objectives, including the availability of prompt emergency service to the public through the 911 system, access to communications by law enforcement officers acting under warrant, and maintenance of universal service, be maintained.

II. THE COMMISSION SHOULD ASSUME A LEADERSHIP ROLE IN ENCOURAGING THE WIDESPREAD DEPLOYMENT OF IP-ENABLED SERVICES

A wide cross-section of commenters – including insurgent VoIP providers,[3] cable companies,[4] equipment manufacturers,[5] wireless providers,[6] traditional CLECs,[7] and incumbent LECs[8] – agree on a fundamental point: a single federal regime for the regulation (and, more to the point, non-regulation) of IP-enabled services is a basic prerequisite to IP technology bringing

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3 *See, e.g.,* Vonage Comments at 14 ("The Commission needs to declare that IP-enabled services are interstate and subject to its jurisdiction before the states create a patchwork of conflicting common carrier regulation that stifles nascent IP-enabled services.").

4 *See, e.g.,* Time Warner Inc. Comments at 26 ("For VoIP to prosper, regulation must be predictable and nationally uniform.").

5 *See, e.g.,* Nortel Networks Comments at 13 ("Because VoIP has no geographic boundaries, the current interstate vs. intrastate structure does not work with VoIP. The current structure is creating jurisdictional conflicts that are slowing down the delivery of rich, new services that consumers will value and that will further reinvigorate the telecom sector."); Lucent Technologies Inc. Comments at 6 ("Lucent feels strongly that there should be a single, national regulatory regime.").

6 *See, e.g.,* Virgin Mobile USA, LLC ("Virgin Mobile") Comments at 1 ("Virgin Mobile requests that the Commission . . . preempt state regulation . . . .").

7 *See, e.g.*, Pac-West Telecomm, Inc. ("Pac-West") Comments at 14 ("Congress has given this Commission a specific mandate that effectively requires preemption of restrictive and inefficient state regulation.").

8 *See, e.g.,* SBC Comments at 43 ("[T]he Commission should affirmatively preempt any state-level counterparts to [Title II common-carrier regulation] as irreconcilable with federal policy in this area, and should likewise make clear that any other state regulations that undermine the congressionally mandated policy of unregulation will be preempted.").

the full measure of potential benefit to consumers. These commenters recognize that only the certainty and predictability created by a single national regulatory regime will permit IP-enabled services to flourish.

Even a coalition of state regulators from nine different states has filed comments urging that "[s]ound public policy argues strongly that any regulation of IP-enabled services such as VoIP occur uniformly."[9] These state regulators forthrightly acknowledge that "IP-enabled services are typically 'borderless' and, thus, necessarily interstate in nature" and that "uniform national regulation over IP-enabled services would provide greater regulatory certainty than would a patchwork of fifty different state policies."[10] In sum, in the words of these state officials, "VoIP, a technology that promises competitive alternatives for our consumers, should not be subject to political whim across numerous states and communities. A national policy – one that is deregulatory in nature and sends an unambiguous signal to the market that the U.S. is receptive to emerging communications technologies – is the best protection against inconsistent and burdensome state regulation."[11] BellSouth agrees fully with this analysis, and applauds these state commissioners for advocating this legally sustainable and economically rational result.

Other state commission commenters, however, take a different position, and seek to preserve crazy-quilt state regulation of IP-enabled services. NARUC argues, for instance, that Congress has expressed an intent to preserve state regulation in this area, and that any attempt to preempt state authority would conflict with federal-court precedent.[12] These claims are

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9 Federation for Economically Rational Utility Policy ("FERUP") Comments at 7.

10 *Id.* at 7-8.

11 *Id.* at 8.

12 NARUC Comments at 10-12.

incorrect. First, far from preserving state regulation in this context, Congress has expressly established its policy to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal *or State* regulation."[13]

More generally, established principles from cases decided both before and after the passage of the 1996 Act make clear that this Commission has the authority to preempt state regulation in cases such as this one. Just this year, the Commission explained that state commissions lacked authority to regulate one IP-enabled service, Pulver.com's Free World Dial-Up. The Commission established there that, where the Commission determines that a service with interstate components should be free of economic regulation, all state attempts to impose such regulation were preempted: "*Any* state attempt to impose economic or other regulations that treat FWD like a telecommunications service would impermissibly interfere with the Commission's valid interest in encouraging the further development of Internet applications such as these, unfettered by Federal or state regulations, and thus would be preempted."[14]

More generally, the Commission explained there that Commission authority is *exclusive* unless that service is (1) "purely intrastate" or (2) it is "practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating federal objectives for the interstate component."[15] The fundamental problem for the commenters that support state regulation – a problem that they never come to grips with – is that IP-enabled technologies are neither purely intrastate nor can they be practically separated

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13 47 U.S.C. § 230(b)(2) (emphasis added).

14 *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, *Memorandum Opinion and Order*, 19 FCC Rcd 3307, 3320, n.70 (2004) (emphasis added) ("*Pulver Declaratory Ruling*").

15 *Id.* ¶ 20.

into interstate and intrastate components. Thus, for instance, in arguing for preserving state regulation of IP-enabled services, the New York State Department of Public Service ("NYDPS") can only assert that it would be "premature" to conclude that it would be impossible for state regulation to coexist with a federal policy of deregulation of IP-enabled services.[16] But there is nothing premature about it. As the Commission stated in the *NPRM*, Internet communications "defy jurisdictional boundaries" because packets are "routed across a global network with multiple access points."[17] Moreover, as BellSouth and other commenters have explained,[18] because IP-enabled services are geographically portable, it is often not possible to know the geographic end-points of a particular communication. Even beyond this, it is not feasible to market separate intrastate and interstate IP-enabled services, because no consumer would be interested in such products.[19] In such a context, any state attempt to regulate IP-enabled services would *necessarily* negate the federal policy of deregulation of those services. Contrary to NARUC's argument, consistent federal-court precedent supports the conclusion that, in such circumstances, this Commission's statutory authority over interstate services supports its decision to preempt contrary state regulations – such as regulations imposing economic regulation in a sphere that the Commission has determined should be free of such regulations.[20]

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16 NYDPS Comments at 9.

17 *IP-Enabled Services*, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863, 4867, ¶ 4 (2004) ("*NPRM*").

18 BellSouth Comments at 34-35; SBC Comments at 32-33.

19 *See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, *Report and Order*, 6 FCC Rcd 7571, 7633-34, ¶ 126 (finding that exclusive federal authority is appropriate in such circumstances) ("*Computer III Remand Order*").

20 *See, e.g., Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989).

For these reasons, even where a particular IP-enabled service is not portable, Commission precedent establishes that exclusive federal authority is appropriate. In particular, in the *GTE Tariff Order*, the Commission determined that the same broadband transmission that supports IP-enabled services is subject to exclusive federal authority under the "mixed use" doctrine applicable where more than 10% of the traffic on a facility is interstate.[21] As the Commission explained, because these services were subject to exclusive federal authority under the mixed use doctrine, it was unnecessary to determine whether state regulation was also preempted on other grounds: "In light of our finding that GTE's ADSL service is subject to federal jurisdiction under the Commission's mixed use facilities rule and properly tariffed as an interstate service, we need not reach the question of whether the inseverability doctrine applies."[22] This mixed-use rule is established commission precedent, and there is no reason not to apply it here to the same broadband transmission at issue in the *GTE Tariff Order* as well as to applications that are bundled with such transmission, particularly in light of the extremely deleterious policy consequences of imposing 51 different regulatory regimes on competitive IP-enabled services.

In this regard, contrary to some commenters' arguments,[23] it is not relevant whether some IP-enabled services are properly understood to be telecommunications services. States have no guarantee of jurisdiction over all telecommunications services. For instance, the special access services at issue in the *GTE Tariff Order* are telecommunications services, but the Commission properly applied its "mixed use" doctrine to determine that they are subject to federal, not state, authority.

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21 *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, CC Docket No. 98-79, *Memorandum Opinion and Order*, 13 FCC Rcd 22466, 22479-80, ¶¶ 23-26 (1998) ("*GTE Tariff Order*").

22 *Id.* at 22481, ¶ 28.

23 *See* Ohio Public Utilities Commission ("Ohio PUC") Comments at 15-16.

In sum, both established precedent and sound policy compel the Commission to establish its exclusive jurisdiction over IP-enabled services.

III. THE COMMISSION SHOULD REJECT DEMANDS TO PERPETUATE ASYMMETRICAL ECONOMIC REGULATION IN THE COMPETITIVE AND INNOVATIVE BROADBAND AND IP-ENABLED SERVICES MARKETS IN THE GUISE OF THE MCI "LAYERS" OR NCTA MODELS

IP-enabled services and networks constitute a significant challenge to regulatory approaches that were developed long before the 1996 overhaul of the Communications Act of 1934. They challenge the traditional regulatory "silos" that reflect the service-specific chapters of the Communications Act as it was revised in the years leading up to 1996. Many commenters argue that the existence of this disruptive technology that can be provided over a variety of facilities platforms argues for a new paradigm of regulatory oversight. There are two distinct camps, however. First, there are those commenters who demonstrate, on a demonstrated record of robust inter-modal competition and growth in broadband and IP-enabled services and markets, that the same deregulatory rules should apply to all providers of IP-enabled services.[24] Second, there are those who eschew fact and contend, based on nothing more than tired rhetoric, that their facilities-based competitors should be saddled with legacy economic regulation developed when AT&T owned a monolithic local and long distance telephone and telegraph network empire and there were relatively few entrants in the market for enhanced services.[25] In accord with congressional intent, the Commission must reject attempts to perpetuate or impose unwarranted asymmetrical regulation on facilities-based providers (the so-called "physical" layer).[26]

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[24] *See, e.g.*, BellSouth Comments at 10-25; Avaya Inc. Comments at 10-12; USTA Comments at 21-33.

[25] *See, e.g.*, CompTel/ASCENT Comments at 13-15, 17; Cbeyond Communications, LLC, *et al.* ("Cbeyond") Comments at 13.

[26] *See, e.g.*, MCI Comments at 13-20; Association for Local Telecommunications Services ("ALTS") Comments at 2-4; Dialpad Communications, Inc. *et al.* ("Dialpad") Comments at 17.

In this regard, the Fact Report submitted in this proceeding[27] supports Commissioner Martin's conclusions and observations with respect to the competitive nature of the facilities that are used to provision IP-enabled services:

> [T]he growth of cable broadband and DSL lines has resulted in fierce competition between these services, with cable still significantly ahead of its telco competitor. In each quarter for the last 4 years, 2/3 of new subscribers have gone to cable broadband. Cable currently has 65% of broadband subscribers. This vibrant competition is what enabled the Commission to deregulate the provision of DSL without risking an increase in DSL prices. Last year, when we deregulated Broadband and eliminated Line-Sharing many here and some at the Commission argued that DSL prices would rise. But, since February of 2002, prices of DSL have dropped about 40%.
>
> . . . .
>
> . . . The 1996 Act has been successful in many areas. We have learned that where competition is vibrant, regulation is not necessary. This is why we have been able to deregulate broadband and still enjoy better service at lower rates. [28]

Indeed, the record compiled in the *Triennial Review* proceeding compelled the Circuit Court of Appeals to observe:

> [W]e agree with the Commission that robust intermodal competition from cable providers – the existence of which is supported by very strong record evidence, including cable's maintenance of a broadband market share on the order of 60%, see *Order P.292* – means that even if all CLECs were driven from the broadband market, mass market consumers will still have the benefits of competition between cable providers and ILECs.[29]

Broadband services are, of course, being offered by more than just cable companies and telephone companies. As the Commission has previously observed:

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27 Peter W. Huber & Evan Leo, Competition in the Provision of Voice Over IP and Other IP-Enabled Services, Prepared for and Submitted by BellSouth, Qwest, SBC, and Verizon, WC Docket No. 04-36, May 28, 2004 ("Fact Report").

28 Kevin J. Martin, Commissioner, Federal Communications Commission, remarks before the NARUC Conference, Committee on Telecommunications, Washington, D.C. (Mar. 8, 2004).

29 *United States Telecom Ass'n v. FCC*, 359 F 3d 554, 582 (D.C. Cir. 2004) ("*USTA II*").

> An increasing number of broadband firms and technologies are providing growing competition to incumbent LECs and incumbent cable companies, apparently limiting the threat that they will be able to preclude competition in the provision of broadband services.[30]

This prompted the Commission to conclude that:

> The record before us, which shows a continuing increase in consumer broadband choices within and among the various delivery technologies – xDSL, cable modems, satellite, fixed wireless, and mobile wireless, suggests that no group of firms or technology will likely be able to dominate the provision of broadband services.[31]

The comments and Fact Report demonstrate that the Commission's conclusion remains correct. At least eight fixed wireless providers as well as the nation's largest electric utilities and satellite providers are providing broadband communications services to consumers and small businesses at competitive prices, and there is widespread broadband competition in the large business enterprise market.[32] The Wireless Internet Service Providers Association states that "[w]ireless ISPs have rolled out broadband service in virtually every state of the union – and in hundreds of rural and metropolitan markets . . . . *Wireless has boldly become the nation's third pipe for last-mile access.*"[33] There is also yet another "pipe," for broadband transmission, for, according to Chairman Powell, "Broadband over Power Line [BPL] has the potential to provide

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30 *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, *Third Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 11857, 11864, ¶ 18 (2000). The abundance of intermodal competition will spur even greater competition in the broadband market as the emergence of new technologies increases, which will enable multiple competitors to use the same general technology to provide services.

31 *Id.* at 11865, ¶ 19.

32 BellSouth Comments at 20-23.

33 Fact Report at A-10 (emphasis added). *See* pages A9-13 of the Fact Report for a detailed account of current fixed wireless broadband service offerings.

consumers with a ubiquitous third broadband pipe to the home."[34] With one third of electric utility companies considering or already using BPL, with BPL reaching approximately one million customers by this year's end, with BPL encompassing six million power lines and generating potentially $3.5 *billion* in revenues, and with BPL speed comparable to or faster than cable or DSL and prices comparable to or lower than cable or DSL,[35] it is clear that BPL represents a formidable fourth pipe alternative, while satellite and third generation (3-G) wireless networks represent yet additional "pipes."[36]

Thus, the Commission should reject calls for economic regulation based on ill-founded notions of broadband bottlenecks. In the first case, the market leaders in broadband access, cable companies, are in fierce competition with telephone companies. As BellSouth demonstrated in its comments, and setting any competitive offerings from fixed wireless, BPL, satellite or 3-G wireless aside, cable modem broadband Internet access service is offered by one or more of at least nine different cable providers in 60 out of 64 of BellSouth's MSAs.[37] And this state of competition is not confined to the southeastern markets; according to the latest FCC High Speed Report, 92% of zip codes in California have two or more high-speed providers.[38] JP Morgan has estimated that, as of December 2003, 75% of all U.S. households were able to choose between

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34 *Id.* at A-13. *See id.* at A13-16 for a detailed account of current BPL service offerings.

35 *Id.* at A14-16.

36 *Id.* at A16-19.

37 BellSouth Comments at 20, n.73.

38 Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003* at Table 13 (June 2004). In some cases one of the two providers is a CLEC, Covad Communications.

cable modem and DSL service, and only 5% of all U.S. households were able to receive DSL but not cable modem service.[39]

Thus, there is simply no justification in fact or law to impose economic regulation on the "physical layer" as MCI and other advocates of that particular model advocate.[40] The MCI model simply seeks to impose old regulation in a new, competitive market, and therefore will discourage innovation and investment, a reality confirmed by the comments of equipment manufacturers: "The application of traditional voice regulations to VoIP – and IP-enabled services – would stifle innovation and restrict economic growth."[41] As the Computing Technology Industry Association ("CompTIA") notes, the economy will be favorably impacted by VoIP, which will (as the Commission itself noted in its *NPRM*) provide consumers with incentives to subscribe to broadband services.[42] The comments of communications and computing equipment manufacturers relative to the economic consequences of legacy economic regulation are especially pertinent and reliable, because "[f]irms that sell goods and services that are *inputs* to the production and use" of new services "stand to gain an expanding market . . . and

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[39] J. Bazinet, *et al.*, JP Morgan, *Broadband 2003* at Figure 9 (Dec. 5, 2002). *See also* Kevin J. Martin, Commissioner, FCC, *FCC: Looking Forward*, presentation before the NARUC Telecommunications Committee at 11 (July 28, 2003) (citing JP Morgan). There are no true broadband monopolies or duopolies. And even if, for the sake of argument, there was at one time a true broadband duopoly, it has been eroded by fixed wireless, BPL, satellite and 3-G wireless competitors. At one time the wireless market itself was characterized as a duopoly, yet the industry's relative scant federal regulation, freedom from state pricing and entry regulation, and eventual explosion of spectrum availability has resulted in widespread competition, falling prices and ever-increasing substitution for POTS. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 02-379, *Eighth Report*, 18 FCC Rcd 14783 (2003).

[40] If market power exists at all in MCI's model, as Verizon points out, it is at the level of the Internet backbone, "where well-entrenched companies, including MCI, manage a vast network of transmission facilities facing little or no competition." Verizon Comments at 20.

[41] Nortel Networks Comments at 9; *see also* Alcatel North America ("Alcatel") Comments at 20-21; 23.

[42] CompTIA Comments at 17-18.

have the incentive to make a completely unbiased judgment on the matter."[43] The economy will suffer under the MCI layers/competitive bias approach, because it is simply a wolf in sheep's clothing.

"Up, down, across," observes Dr. Brough, "[the MCI Layers model] is still regulation."[44] As the authors of a recent NMRC analysis point out, MCI's "layers" approach is a "seductive analytical tool that "is burdened with the same regulatory traps of current law."[45] The most egregious deficiencies in the MCI model are summarized by the NMRC:

(1) the model simplifies complex network interconnections;

(2) the model transfers the current regulatory model for traditional telecom networks to future broadband networks;

(3) the model does not work economically and discourages technological innovation and network investment; and

(4) the model ignores the benefits that vertical integration can provide for the industry and consumers.[46]

MCI's model is being used to rationalize in theory the perpetuation of discredited, outdated, unnecessary and inefficient economic regulation on Bell Operating Company ("BOC") ILECs in particular, and on all facilities-based providers in general. Facilities owners, particularly "last mile" providers, alone would be required to pay into the universal service fund, would not be able to charge for access to their facilities, and would be subject to *Computer*

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43 *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993).

44 Wayne T. Brough, "Up, Down, Across – It's Still Regulation," in *Free Ride: Deficiencies of the MCI "Layers' Policy Model and the Need for Principles that Encourage Competition in the New IP World*, New Millennium Research Council ("NMRC") (July 2004) at 4, *available at* www.newmillenniumresearch.org/news/071304_report.pdf.

45 *Id.* at vi.

46 *Id.* at vii.

Inquiry unbundling requirements. Such a result would tilt the playing field upward in favor of the entities operating in the low cost, low risk, and highly profitable "applications layer," and against those entities in a position to create new and innovative advanced networks capable of facilitating even greater communications capabilities.

While clearly aimed at BOCs, nothing limits this approach from being applied to other non-BOC ILECs, to power companies with broadband transmission lines, to cable companies, and to wireless companies in light of spectrum scarcity. This is precisely the wrong approach to take in the current competitive state of the broadband and IP-enabled services markets. For all these reasons, BellSouth agrees with Verizon and others that the so-called "physical layer" should be just as free of economic regulation as the "application" or "content" layers.[47]

The model advocated by NCTA contains similar flaws as it advocates freedom from legacy regulation for all but incumbent LECs.[48] It makes no sense to perpetuate legacy economic regulation on the non-dominant provider of broadband services, especially in favor of the dominant provider of those services. Further, it is not clear what corresponding obligations VoIP service providers would have in connection with the "rights" that NCTA proposes that they have. While BellSouth agrees generally with NCTA that the particular path taken with respect to VoIP is not as important as reaching the correct end result, it isn't clear to BellSouth that NCTA's end goal is true deregulatory parity, in that it appears once again that one subset of IP-enabled service providers would have more regulatory obligations than others. In this regard, certain rights reserved by statute to telecommunications service providers, which are balanced by corresponding obligations, need not necessarily be extended to IP-enabled information service

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47 Verizon Comments at 21.

48 National Cable & Telecommunications Association ("NCTA") Comments at 20 (freedom from legacy regulation limited to VoIP service provided in competition with incumbent utility phone service).

providers. These providers can seek to become certified local exchange carriers, or partner or team with another certified LEC, in order to obtain interconnection, telephone numbers and other inputs they might desire. To be sure, the Commission has a long established set of procedures that all entities must follow in order to access the PSTN and provide telecommunications services to end users. The Commission should not create new category rules or procedures for IP enabled information service providers.

IV. REGARDLESS OF REGULATORY CLASSIFICATION, ALL IP-ENABLED SERVICES SHOULD BE ALLOWED TO DEVELOP WITHOUT ECONOMIC REGULATION

The 1996 Act mandates a federal, deregulatory approach to all interstate telecommunications regulation and further clarifies that all information services have a telecommunications component. Thus, whether the provision of an IP-enabled service is a "telecommunications service" under current regulatory classifications, as BellSouth contends some may be,[49] and as some commenters insist all VoIP services are,[50] or whether it is an "information service," as BellSouth maintains most IP-enabled services are, and as others insist all IP-enabled services of any stripe are,[51] Congress has instructed the FCC to rely upon the power of the market, not regulatory fiat, in order to encourage the growth and deployment of new and advanced services to all Americans.[52]

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[49] *See also* USTA Comments at 19-21.

[50] *See, e.g.*, City and County of San Francisco Comments at 3; Inclusive Technologies Comments at 2-3; Interstate Telcom Consulting, Inc. Comments at 2-3; Communications Workers of America ("CWA") Comments at 6-10; National Association of State Utility Consumer Advocates ("NASUCA") Comments at 57.

[51] *See, e.g.*, MCI Comments at 21-23; Qwest Comments at 14-19; SBC Comments at 33-36.

[52] *See* § 706 of the Telecommunications Act of 1996, Pub. L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 USC § 157 (the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"); 47 U.S.C. § 230(b) (it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other

The fundamental point is that the regulatory classification of IP-enabled services as information services or telecommunications services shouldn't matter – competing IP-enabled services should be treated the same, with no economic regulation.[53] Alcatel correctly urges the FCC to eliminate disparities between IP-enabled services based on legacy rules or the specific platforms used to provide IP-enabled services.[54] As USTA explains:

> The Commission should ensure that all providers of IP-enabled services have the same regulatory obligation, regardless of the technology or transmission media they use.
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> . . . .
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> . . .[T]he FCC itself has recently recognized the anti-competitive effects of such asymmetrical regulation, and in particular how such rules encourage companies to compete not on the merits, but through arbitrage and regulatory gamesmanship.
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> . . . .
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> All these precedents establish that competition on the merits is best served, and arbitrage best avoided, when the FCC adopts even-handed rules that treat like services alike regardless of transmission media or legacy regulation.[55]

Certain categories of IP-enabled services, especially voice over Internet protocol ("VoIP") or similar services using or terminating voice traffic to North American Numbering Plan ("NANP")/PSTN telephone numbers, should not only be treated as interstate in nature and subject to the Commission's exclusive jurisdiction, but also subject to universal service fund funding obligations without double taxation or assessment at the facility level; appropriate E911

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interactive computer services, unfettered by Federal or State regulation"); 47 U.S.C. § 160(a), (b).

[53] This should be true even if the service is used as a substitute for POTS. If a service meets the definition of an IP-enabled telecommunication or information service, it should not be saddled with Title II regulation simply because it acts as a substitute for traditional POTS.

[54] Alcatel North America Comments at 20-22; *see also* America's Rural Consortium Comments at 4-5.

[55] USTA Comments at 10-14.

and disabilities access obligations; and CALEA-like accommodations where shown by industry collaborations to be technically and economically reasonably achievable. [56]

Because the Commission has the authority to establish a rational, even-handed regulatory scheme regardless of whether particular IP-enabled services are telecommunications services or information services,[57] it should make clear that regardless of regulatory classification, the proper pro-competitive result will follow. Such a result will provide regulatory clarity and prevent the Commission from becoming bogged down in a pragmatically pointless discussion of appropriate regulatory classifications.

The fundamental point is that this new generation of advanced communications services and the broadband networks associated with them should be free from economic regulation, regardless of what kind of entity provides them. The Commission has the legal authority to create such a deregulatory scheme for all IP-enabled services. To the extent that Title II/common carrier based economic regulation may otherwise attach to IP-enabled services, the Commission must exercise its forbearance and waiver authority to prevent these services from being subjected to economic regulation.

By the same token, because the Commission has ample legal authority to require that all similarly situated carriers pay the same access charges and universal service fees,[58] the Commission has no valid reason not to do so. In particular, equitable PSTN compensation and universal service funding solutions should be achieved that will eliminate current distortions and

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56 *See, e.g.*, CWA Comments at 16-24; GVNW Consulting, Inc. ("GVNW") Comments at 7-9; NASUCA Comments at 47-57, 63-67; NCTA Comments at 16-19; Time Warner Inc. Comments at 11-16.

57 BellSouth Comments at 25-36; Time Warner Inc. Comments at 21-25; NCTA Comments at 45.

58 BellSouth Comments at 44-49.

opportunities for arbitrage and significantly reduce, if not eliminate, incentives for arbitrage in the future.

Commenters such as MCI contend that the Commission's Title I authority is not sufficient to authorize the imposition of access charge (and universal service) obligations on information services that compete with telecommunications services.[59] That is incorrect. The Commission's long-standing assertion of jurisdiction over information services has been affirmed by the D.C. Circuit as "reasonably ancillary" to the Commission's responsibility to "assure a nationwide system of wire communications services at reasonable prices."[60] Indeed, the Commission's decision to exempt information services from access charges necessarily indicates that it would have the authority to impose those obligations where appropriate.[61] Moreover, contrary to MCI's argument, the fact that Congress did nothing to undermine the Commission's assertion of authority over information services when it passed the 1996 Act confirms that the Commission's decisions accord with statutory principles.

Even more to the point for present purposes, the Supreme Court has made plain that Title I is appropriately used to ensure even-handed treatment of new services with services that fall within the Commission's traditional regulatory authority.[62] And it cannot seriously be disputed that regulation to ensure that a subset of competing users of the PSTN (telecommunications carriers) do not bear a disproportionate share of the costs of maintaining that network is thus reasonably ancillary to the Commission's duty to ensure "rapid, efficient, Nation-wide and

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59 *See* MCI Comments at 24.

60 *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982).

61 *See, e.g., Access Charge Reform, et al.*, CC Docket Nos. 96-262, *et al.*, *First Report and Order*, 12 FCC Rcd 15982, 16132-33, ¶ 343 (1997) ("*Access Charge Reform Order*").

62 *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

world-wide wire and radio communications service *with adequate facilities at reasonable charges."*[63]

In this regard, BellSouth is not arguing that the Commission could impose any regulation it desires on any information service regardless of whether that is ancillary to a statutory purpose.[64] That is not the issue. The real question is whether the Commission has authority to impose the same compensation rules (and other requirement such as 911) on IP-enabled services that compete with telecommunications services providers and use the PSTN in an analogous manner. Under the federal court decisions that BellSouth discussed above and in BellSouth's opening comments (at 29-32, 45-46), it assuredly does have the authority. Indeed, even MCI concedes that "[t]o the extent that some [IP-enabled] voice applications have begun to compete directly with traditional telephone service, so that users of those voice applications may use those applications and not traditional telephone service, the Commission may have the authority to impose E911 requirements."[65] By the same reasoning, when IP-enabled services use the PSTN in the same way as traditional IXCs, the Commission has authority to impose access charges (and universal service obligations) on those carriers just as it does on other providers in order to further established statutory goals.

A. The Commission Should Establish a Unified Intercarrier Compensation Mechanism That Will Apply to All IP-Enabled Services That Use the PSTN

There is widespread support for the Commission's observation that: "As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne

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63 47 U.S.C. § 151 (emphasis added).

64 *See* MCI Comments at 33.

65 *Id.* at 34-35.

equitably among those that use it in similar ways."[66] A large number of commenters agree that if IP-enabled services use the PSTN and require a LEC to use its switches and other facilities to terminate a call that starts on an IP network (or to originate a call that is then handed over to an IP network), the LEC should be compensated through access charges (or any future mechanism) just as it is compensated for performing the same functions to originate or terminate other interstate communications.[67] Any government mandate or policy that allows some carriers to avoid access charges because of the technology they use would therefore deprive LECs of the use of, and appropriate compensation for, their property.

Indeed, even AT&T itself acknowledges that the "Commission should not pick winners and losers" by applying different regulatory rules to competing entities.[68] Contrary to AT&T's understanding, however, that fundamental insight compels the conclusion that *all* providers that use the PSTN to originate or terminate calls should be subject to the same intercarrier compensation obligations, regardless of whether they use IP technology or circuit-switched technology. VoIP providers are providers of interstate communications services, and, to the extent they use the PSTN to terminate or originate communications, they should have the same obligations as other interstate interexchange carriers, in order to avoid arbitrage and artificial advantages.

AT&T is wrong when it states that such a policy of regulatory parity will create disincentives for investment in IP-enabled services; to the contrary, such even-handed treatment

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66 *NPRM* ¶ 61.

67 *See, e.g.*, Time Warner Inc. Comments at 15-16; CWA Comments at 18-19; DJE Teleconsulting, LLC ("DJE") Comments at 5; General Communication, Inc. ("GCI") Comments at 15; Independent Telephone & Telecommunications Alliance ("ITTA") Comments at 6-7; NASUCA Comments at 70-73; Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") Comments 2-6; Ohio PUC Comments at 34-35.

68 AT&T Comments at 24.

simply removes an artificial, regulatory incentive to invest in a particular technology, a result AT&T itself claims should be avoided.[69] Any other result would lead to providers using IP technology not because it is more efficient or offers more value to customers but simply because, by using that particular technology, they could avoid paying for the costs they impose on the PSTN.

As the Commission explained in a related context, there is no sound policy reason to create such a regime. The Commission would merely be creating "artificial incentives for carriers to convert to IP networks. Rather than converting at a pace commensurate with the capability to provide enhanced functionality, carriers would convert to IP networks merely to take advantage of the cost advantage [of avoiding access charges] . . . . IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid paying access charges."[70] BellSouth fully agrees with that analysis, which applies equally here. It is no answer to simply allege that current access charges are "bloated" or "distorted" or that VoIP providers may purchase business lines or pay reciprocal compensation and so therefore don't get an entirely "free ride."[71] In the first place, AT&T's charges are incorrect. This Commission has worked long and hard on, and the industry itself has participated in, significant efforts to streamline and improve the interstate access charge regime.[72] As the Commission noted in adopting the *CALLS Order*:

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69 *Id.*

70 *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges,* WC Docket No. 02-361, *Order*, 19 FCC Rcd 7457, 7469, ¶ 18 (2004).

71 AT&T Comments at 22-28.

72 See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board On Universal Service, CC Docket Nos. 96-262, 94-1, 99-249 & 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-

> We adopt the CALLS Proposal as it relates to local switching, trunking, and special access. We believe the proposal is in the public interest because it provides an immediate reduction in switched access rates that will result in lower long-distance charges for consumers, while also simplifying the current price cap access charge regime. Adoption of the CALLS Proposal will result in an immediate $2.1 billion reduction in switched access usage charges. All price cap LECs will make the CALLS Proposal's switched access usage charge reductions on July 1, 2000.[73]

Second, even if AT&T were correct, the proper way to address this issue is not by the Commission creating an arbitrage opportunity for VoIP providers, but by the Commission completing overall intercarrier compensation reform and rate restructuring in a rational way that applies to them and all other providers of equivalent interstate services. The Commission should continue its efforts to reform the current system. In this regard, the Commission should reject arguments imposing reciprocal compensation as an appropriate compensation mechanism prior to resolving the pending intercarrier compensation proceeding for all types of interstate communications.[74] As the National Exchange Carrier Association ("NECA") explains, reciprocal compensation rates currently encourage uneconomic arbitrage.[75] The Commission clearly has the authority to impose an alternative, even-handed regime, and sound public policy compels it to do so now.

1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) ("CALLS Order").

73 *Id.* at 13025, ¶ 151.

74 *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92.

75 NECA Comments at 9-13.

1. The Commission should also allow for fraud prevention

BellSouth agrees with SBC that the Commission should permit carriers to adopt effective mechanisms for preventing fraud in the implementation of a declaration that interstate access charges are currently applicable to IP-enabled services that originate or terminate in circuit-switched format on the PSTN.[76] A mere declaration, without clarification of authorized fraud prevention measures, allocation of the burden of proof, and a commitment to enforce its rules, will not prevent providers from engaging in unlawful access charge avoidance schemes.[77] It is imperative that as part of the unified intercarrier compensation regime that takes into account traffic delivered from or to the PSTN by IP-enabled services providers, the Commission establishes appropriate and effective fraud prevention mechanisms.

2. In the meantime, the Commission should enforce its existing rules

AT&T and others continue to misconstrue the scope of the ESP exemption to the current access charge regime.[78] This Commission's decisions that provided ESPs with a limited exemption from the ordinary forms of access charges that would otherwise apply to them when calls are originated on the PSTN demonstrate fundamentally that Commission has the authority to require information service providers to pay access charges.[79] The Commission subsequently decided to provide a limited exemption to those providers from some access charges, thus

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76 SBC Comments at 80.

77 *Id.*

78 AT&T Comments at 22-23; Qwest Comments at 41-42.

79 The Commission's decisions make plain that "enhanced service providers" are among the users of "access services." *MTS and WATS Market Structure,* CC Docket No. 78-72 Phase I, *Memorandum Opinion and Order*, 97 F.C.C.2d 682, 711, ¶ 78 (1983). *See Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266, BellSouth Reply at 3-8, Reply Comments of SBC Communications at 4-13, Reply Comments of the Verizon Telephone Companies at 4-7 (filed Mar. 31, 2004).

waiving rules that would otherwise apply and therefore demonstrating that the Commission was and is empowered to require these providers to pay these charges.[80] Indeed, the Commission has made plain that it was continuing this narrow exemption because it believed that ESPs were using the PSTN in a manner different than IXCs, the traditional payers of access charges, and in fact were more like business users of the telephone network.[81] The Eighth Circuit agreed with that analysis, and expressly based its affirmance of the Commission on the conclusion that ISPs "do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges."[82] But as the *NPRM* itself explains, that logic does not apply in circumstances where IP-enabled service providers do use local circuit-switched networks in precisely the same way as traditional IXCs do. In those circumstances, the "cost of the PSTN should be borne equitably among those that use it in similar ways."[83]

As SBC explains, the original ESP exemption did not convert information service providers from being among the variety of users of access service into true "end users"; rather, they were merely treated as end users for pricing purposes.[84] And as Verizon points out, the Commission never intended the exemption to apply to the situation where a caller, whether or not a VoIP subscriber, uses an ordinary telephone to call a VoIP subscriber or where a VoIP subscriber uses an IP telephone to reach a called party on the PSTN.[85] The PSTN end user in this example is not a customer of the ISP and is not receiving an information service; therefore

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80 *See, e.g., Access Charge Reform Order,* 12 FCC Rcd at 16132-33, ¶ 343.

81 *See id.* at 16133, ¶ 345.

82 *Southwestern Bell Tel Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

83 *NPRM* ¶ 61.

84 SBC Comments at 69-70.

85 Verizon at Comments at 46-47.

the information service provider should have the same obligation to pay access charges on the PSTN leg of the call as any other user of a LEC's local switching facilities.[86] Both law and policy require that all users of the PSTN pay the same interstate rates when they use the PSTN for the same interstate services, regardless of service technology.[87]

The Commission should therefore reject the arguments of commenters who state that IP-enabled services that are information services are not subject to access charges today, and should not be required to compensate LECs for their use of the PSTN in connection with IP-enabled services in the future.

B. All IP-Enabled Service Providers Should Have Identical Universal Service Funding Obligations

As the Commission has explained, contribution policies should "reduce[] the possibility that carriers with universal service obligations will compete directly with carriers without such obligations."[88] In the Commission's words, "the public interest *requires* that, to the extent possible, carriers with universal service contribution obligations should not be at a competitive disadvantage in relation to [other] providers on the basis that they do not have such obligations."[89] The Commission must apply the same universal service duties to IP-based services that use the PSTN as it imposes on their competitors that use more traditional technologies. Any other result would disadvantage one set of providers because of the technology they use and reduce support for universal service as more and more consumers

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86 SBC Comments at 70-71.

87 *Id.* at 68-81; BellSouth Comments at 43-48.

88 *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, 12 FCC Rcd 8776, 9183-84, ¶ 795 (1997) ("*First Universal Service Order*").

89 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd 11501, 11565, ¶ 133 (1998) (emphasis added) ("*Report to Congress*").

switch to IP-based services. The Commission should reject, and repudiate, efforts by carriers to foist the burden solely on so-called providers of "last mile" PSTN facilities.[90]

Those results are contrary to the Communications Act, which requires "sufficient," "predictable," and "nondiscriminatory" mechanisms to support universal service.[91] They are equally inconsistent with the Commission's own prior determinations that universal service mechanisms should be technologically neutral, in order to allow the "marketplace to direct the advancement of technology and all citizens to benefit from such development."[92]

The Commission has explicit statutory authority to extend universal service obligations to IP-enabled information services. Section 254(d) authorizes the Commission to require all providers of interstate "telecommunications" to "contribute to the preservation and advancement of universal service" if the "public interest so requires." Because "information services" are, by statutory definition, provided "via telecommunications,"[93] underlying every interstate information service is an interstate "telecommunications" component sufficient to trigger section 254(d). The Commission should therefore require IP-enabled information service providers, as well as IP-enabled telecommunications services providers, to contribute to the Universal Service Fund when their service originates or terminates calls on the PSTN.

V. *COMPUTER INQUIRY* RULES MUST NOT APPLY TO THE PROVISION OF IP-ENABLED SERVICES

As BellSouth urged in its comments, and as Verizon correctly states, the Commission must refrain from imposing any of the *Computer Inquiry* rules on providers of IP-enabled

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90 *See, e.g.*, MCI Comments at 48-49.

91 47 U.S.C. § 254(b)(5), (d).

92 *First Universal Service Order* 12 FCC Rcd at 8802, ¶ 49.

93 47 U.S.C. §153(20). *See* Comcast Comments at 11-13; CompTel/ASCENT Comments at 6, n.11; Earthlink Comments at 15.

services.[94] Verizon observes correctly that these rules were predicated on the belief that, at the time, a single firm controlled access to all transmission services. They are thus totally inappropriate in the current communications environment in general, and in the broadband and IP-enabled services context in particular.[95] There is no evidence in this or any other administrative record compiled by the Commission that any LEC has inhibited the development of enhanced or information or IP-enabled service markets, or of competition within those markets. To the contrary, the application of regulatory constraints on BOC participation in enhanced service markets, and their continued application to BOC participation in information and IP-enabled services markets, have hindered and will continue to stymie the development of innovative services, thus making them more costly or leaving them undeveloped. There is simply no need to retain any vestige of the Commission's pre-1996 efforts to establish artificial market controls in order to encourage the development of IP-enabled services markets when the market is thriving, especially since this regulation has been overtaken by SIP technology that enables emerging inter-modal facilities competition from cable operators, power companies, wireless, and wireless broadband providers, and software providers who can offer voice services.[96]

As BellSouth explained in its comments and has reiterated above, ILECs are minority providers of the broadband transmission necessary to support IP-enabled information services, and the Commission has already determined that it would waive these requirements as to broadband-based information services offered by cable providers, the market leaders.[97] If these

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94 Verizon Comments at 21-24.

95 *Id.*

96 Scott Cleland, *Bell Legal Victory: Winning the Battle but Losing the War*, Precursor, June 18, 2004.

97 BellSouth Comments at 14-23.

rules are not in the public interest as applied to the market leaders, there is no rational basis to continue to apply them to secondary players. Existing asymmetrical regulation has caused, and is continuing to cause, significant *harm* to all broadband consumers in the form of artificially increased prices. As BellSouth has demonstrated, in attempting to comply with the existing *Computer Inquiry* requirement to break out and offer a basic transmission service for each of its enhanced service offerings, the least costly approach in many instance is to segregate the regulated and non-regulated functions, a process that erodes entirely the efficiencies and benefits of the enhanced services that justified their development in the first place.[98] And as technology improves and permits the deployment of more efficient and more sophisticated network designs that integrate enhanced and basic functionalities, the cost of continued compliance with the legacy *Computer Inquiry* requirements increases sharply.[99]

The Commission itself stressed the burdensome nature of the *Computer* requirements in the context of their application to market leading cable providers. Among other things, these economic regulations require "radical surgery" by forcing carriers to "extract" a telecommunications service from every information service and to subject it to the common carrier requirements of Title II.[100] Imposition of the *Computer Inquiry* requirements on cable modem access providers, the Commission explained, would discourage facilities-based

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98 Letter from L. Barbee Ponder IV, Senior Regulatory Counsel-D.C., BellSouth Corporation, to Marlene Dortch, Secretary, FCC, CC Docket No. 02-33, *et al.*, at 2 (Apr. 20, 2004).

99 *Id.*

100 *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 & CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, 4825, ¶ 43 (2002) ("*Cable Modem Declaratory Ruling*").

competition in both voice telephony and broadband services,[101] and "disserve the goal of Section 706 that we 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market or other regulatory methods that *remove barriers to infrastructure investment.*'"[102]

As SBC explains, the Commission must ensure competitive neutrality by adopting symmetrical rules for intermodal providers of competing services.[103] If it waives or forbears from the application of Title II obligations, including *Computer Inquiry* requirements, to cable modem service, it is legally obligated to forbear to the same extent from the application of these regulations to any IP-enabled service that might be characterized as a telecommunications service.[104]

The Commission should also reject the appeals of the New Jersey Department of the Ratepayer Advocate ("NJDRA") to "enforce separate affiliate requirements in order to regulate VoIP providers who are also providers of interexchange, local exchange, and cable services in lieu of imposing economic regulation."[105] While the NJDRA does not specify which requirements it seeks the Commission to enforce, BellSouth believes that promulgation of structural separation requirements in the wake of the 1996 Act in general, and in the context of IP-enabled services and broadband Internet access in particular, is completely unwarranted. Structural separation and separate affiliate requirements are amongst the most pernicious of economic regulation, and two decades ago the Commission noted, in the very order cited by the

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101 *See id.* at 4826, ¶¶ 46-47.

102 *Id.* ¶ 47 (internal quotation marks omitted; ellipses in original; emphasis added).

103 SBC Comments at 40, citing *USTA II.*

104 *Id.*

105 NJDRA Comments at 19.

NJDRA, that these requirements can "decrease efficiency" and negatively affect a carrier's ability to compete.[106] There is simply no factual record indicating the need to impose or reimpose any such requirements in the highly competitive IP-enabled and broadband communications services markets.

VI. MINIMALLY INTRUSIVE CALEA, E911, DISABILITIES ACCESS, CONSUMER PROTECTION, AND TRS OBLIGATIONS SHOULD APPLY TO VOIP SERVICES

BellSouth agrees with those commenters who state that the Commission can and should require certain IP-enabled information services to be subject to the same important public interest, consumer protection, and safety regulations that providers of both traditional and IP-enabled telecommunications services are.[107] BellSouth has a long history of cooperation with law enforcement, which has existed long before the promulgation of CALEA. BellSouth has been an active participant in the development of technical standards and products necessary to comply with CALEA and has devoted substantial time and resources to upgrade its network to deploy CALEA-compliant solutions. BellSouth remains committed to working together with the FBI, DOJ, and other members of the industry to develop standards for IP-enabled services that fall within the scope of CALEA. Moreover, BellSouth believes that the interest of safety requires all providers of VoIP, regardless of the technology used in providing the services, to provide E9-1-1 features and functionalities. BellSouth strongly encourages the Commission to use NENA for guidance on leading the industry in developing technical and operational solutions and standards that would allow VoIP and IP-enabled services to progress in implementing 911

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106 *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, *Fifth Report and Order*, 98 F.C.C. 2d 1191, 1197, ¶ 8 (1984) (noting the Commission's commitment to minimum degree of separation necessary). This *Order* did not impose any structural separation requirements, and those that it refers to have been eliminated or waived; thus, the NJDRA's citation to it is simply inapt.

107 *See, e.g.*, CWA Comments at 16-24; NASUCA Comments at 47-57; Verizon Comments at 47-55.

capabilities in manageable stages.[108] BellSouth does not believe that the promulgation of best practices for IP-enabled services can be established before the technical solutions to a well-defined set of requirements are identified.[109] To assist in the adoption of VoIP E9-1-1 solutions, once NENA's has provided guidance, the Commission could authorize a set of best practices to be published through the NRIC-7 Focus Group 1, Subcommittees 1A and/or 1B, a committee chartered by the Commission. In sum, while BellSouth believes that the time is right for the Commission to begin considering E9-1-1 rules for VoIP and IP-enabled services, the Commission should not mandate any rules that do not take into consideration the NENA findings and recommendations.

The 1996 Act and FCC rules impose important consumer protections on telecommunications carriers that must apply to all VoIP services providers. Consumer protections designed to prevent slamming, enforce truth-in-billing and CPNI requirements, and ensure that customers are able to choose their long distance providers should be afforded to those customers using IP-enabled services.

Most of these commenters focus their attention, with respect to these topics, on VoIP, and these requirements should certainly adhere to VoIP. BellSouth believes that the Commission should adopt the following three-part test to determine whether any particular IP-enabled information service should subject to these requirements:

The service:

(1) includes a voice capability component; and

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[108] NENA already has a working group, the VoIP/Packet Technical Committee Working Group - Migratory Definitions Working Group, that is currently addressing short-term proposals through industry participation in order to develop appropriate industry standards.

[109] For example, number portability poses a significant problem for E9-1-1 systems and non-911 operational support systems ("OSS's"). The assignment of the telephone numbers is critical to E9-1-1 systems. Accordingly, significant thought must be given to all aspects of E9-1-1 service before reaching final conclusions.

(2) is either:

a. assigned a NANP telephone number, or

b. can call a line assigned to a NANP telephone number; and

(3) either

a. originates or terminates or both originates and terminates calls on the PSTN; or

b. is a substitute for traditional voice communications.

A number of comments suggest one or more of the foregoing indicia.[110]

BellSouth generally agrees with those parties that argue that standards in these areas are best developed in the context of industry forums.[111] At the same time, however, providers of IP-enabled information services should not be subject, to the extent possible, to substantially less rigorous requirements than providers of functionally equivalent IP-enabled telecommunications services or circuit switched services. Therefore, the Commission should be prepared to use its statutory powers of forbearance to forbear from applying non-essential requirements to telecommunications service providers in order to equalize the playing field for both providers of IP-enabled information services and IP-enabled telecommunications services.

The Commission should take a similar approach with respect to other regulatory requirements that arise out of the provision of Title II common carrier services. Thus, if the Commission grants APCC's request to assure the passage of payphone ANI by providers of information services, the technical details should be resolved by the industry, and providers of

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110 *See, e.g.*, Verizon Comments at 48; NCTA Comments at 9-11, 16-19; Time Warner Inc. Comments at 7-10; Association of Public-Safety Communications Officials-International, Inc. ("APCO") Comments at 6-7.

111 *See, e.g.*, Missouri Public Service Commission Comments at 10; CompTel/ASCENT Comments at 18-19; Consumer Electronics Association ("CEA") Comments at 6-7; Dialpad Comments at 20-21; Net2Phone, Inc. Comments at 22-25.

telecommunications services should not be subject to more burdensome requirements.[112] Similarly, some IP-enabled service providers seek non-discriminatory access to utility poles and rights-of-way. Assuming these service providers meet the three-part test outlined above, they should theoretically have the same rights of access to utility poles and rights-of-way as entities that provide a similar service; however, the Commission must be especially sensitive to the disparate rate structures inherent in the Pole Attachments Act.[113] Prior to allowing such access, the Commission must undertake a thorough evaluation of its current rules implementing section 224, and forbear where necessary from statutory provisions grounded, as the outdated and irrelevant *Computer Inquiry* rules are, on an outdated one-wire, single provider view of the world. The assumption that LECs possess anywhere near the pole plant, market strength, or bargaining power of electric and other utilities covered by the Act is simply unsupportable.

VII. THE COMMISSION SHOULD BE ESPECIALLY VIGILANT OF NETWORK SECURITY ISSUES AND ALLOW THE INDUSTRY TO CONTINUE TO REACH DEFINITIVE CONCLUSIONS ON INDUSTRY-WIDE SECURITY STANDARDS

ATIS recently announced the unanimous approval and endorsement by its board of directors of two comprehensive technical work plans designed to produce a full suite of

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112 American Public Communications Council ("APCC") Comments at 7-9.

113 Telecommunications service providers are subject to different (higher) pole attachment rates than cable service providers. In addition, while pure information service providers are not covered by the Pole Attachments Act, cable service providers that offer cable modem service, an information service, get the benefit of the lower cable service rate. However, telecommunications service providers that offer equivalent broadband Internet access services must pay the higher telecommunications rate. Finally, even though electric utilities that provide telecommunications or cable services and own the majority of pole plant and thousands of miles of transmission facilities may have available to them the benefits and remedies afforded to CLECs and cable companies, ILECs currently lack similar rate protection and procedural remedies. Accordingly, the Commission should comprehensively reform its current pole attachments scheme to ensure an approach that treats all providers of voice communications the same by providing all providers rights and remedies.

standards supporting carrier-class VoIP and network security.[114] This is precisely the kind of mutual collaboration that the industry is capable of undertaking to achieve overarching network related standards, and that the Commission should continue to encourage. These work plans "clear[] the path for industry-wide consensus on open technical and operational standards supporting VoIP and network security."[115] Nothing the Commission does in this proceeding should hamper or alter the consensus achieved within ATIS or the future work of the industry in building open standards based on a universal set of requirements. Indeed, the Commission should encourage ATIS to continue to develop a security operational guideline that identifies the functions and information necessary to manage security-related services throughout the network infrastructure. The Commission should endorse an IP-enabled services policy that favors a single approach for denial of service attacks and for an interoperable application layer protocol access control mechanism.

VIII. CONCLUSION

The Commission should, among other things, use its ancillary Title I authority and its forbearance authority under Title II to craft an even-handed IP-enabled services regulatory regime as outlined above and in BellSouth's comments and avoid the disparate treatment of competing technologies that might otherwise accompany the legacy "classification" of an IP-enabled service.

Respectfully submitted,

BELLSOUTH CORPORATION

By: /s/ Theodore R. Kingsley

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114 *Telecom Industry Releases VoIP and Network Security Work Plans*, Business Wire (June 18, 2004), *at* http://biz.yahoo.com/bw/040618/185393_1.html.

115 *Id.*

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I do hereby certify that I have this 14th day of July 2004 served the parties of record to this action with a copy of the foregoing **REPLY COMMENTS** by electronic mail and/or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties on the attached service list.

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